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MONEY LAUNDERING LEGISLATION

HEARING

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 572, S. 1335, and S. 1385

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MONEY LAUNDERING LEGISLATION

TUESDAY, OCTOBER 29, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Biden, Grassley, DeConcini, Specter, and McConnell.

Also present: Diana Waterman, general counsel; Edward H. Baxter, minority counsel, and Scott Green, minority professional staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee meets this morning to hold a hearing on money laundering legislation. The committee will focus its attention on various legislation designed to address the ever-increasing problem of money laundering.

The President's Commission on Organized Crime has identified this problem as one of the biggest challenges facing law enforcement today. It has been estimated that billions of dollars each year are being laundered through the financial institutions of this Nation.

A wide variety of organized criminal groups ranging from drug trafficking rings to the more traditional organized crime racketeers, could not reap the profits of their unlawful activity without the means to camouflage their proceeds to appear as though they came from legitimate sources and business investments.

The need for stronger laws against money laundering has been further emphasized by cases such as "Operation Greenback" in Miami and "Operation El Dorado" in New York.

I believe there is clear bipartisan recognition of the need to strengthen our laws in order to attack this criminal enterprise. The committee has before it three bills designed to aid law enforcement in eliminating the huge profits reaped by sophisticated money laundering techniques

S. 572, the Money Laundering Crimes Act, has been introduced by Senator D'Amato and S. 1385, the Money Laundering Crimes and Disclosure Act of 1985, has been introduced by Senator DeConcini. Both of my distinguished colleagues are to be commended for their initiative and leadership in this area.

The Department of Justice and the Treasury Department are also to be praised for preparing a comprehensive bill, S. 1335, the

Money Laundering and Related Crimes Act of 1985, which I introduced on behalf of the Justice Department.

We look forward to hearing the testimony of a fine group of witnesses today.

At this point in the record, we will include the text of S. 1385 and statements from Senators Mathias, Grassley, Biden, DeConcini, and McConnell.

[Text and statements follow:]

II

99TH CONGRESS
1ST SESSION

S. 1335

Entitled the "Money Laundering and Related Crimes Act of 1985".

IN THE SENATE OF THE UNITED STATES

JUNE 20 (legislative day, JUNE 3), 1985

Mr. THURMOND (for himself, Mr. D'AMATO, Mr. ROTH, Mr. DENTON, and Mrs. HAWKINS) (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

Entitled the "Money Laundering and Related Crimes Act of 1985".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Money Laundering and Related Crimes Act of 1985".

SEC. 2. (a) Chapter 95 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1956. Laundering of monetary instruments

"(a) Whoever conducts, causes to be conducted, or attempts to conduct a transaction involving the movement of

funds by wire or other electronic means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or conducts, causes to be conducted, or attempts to conduct such a transaction, through or by a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree—

"(1) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity; or

"(2) knowing or with reckless disregard of the fact that such monetary instruments or funds represent the proceeds of, or are derived directly or indirectly from the proceeds of, any unlawful activity

shall be sentenced to a fine of not more than $250,000 or twice the value of the monetary instruments or wire transferred funds, whichever is greater, or imprisonment for not more than twenty years, or both.

"(b) Whoever conducts, causes to be conducted, or attempts to conduct a transaction described in subsection (a) is liable to the United States for a civil penalty of not more than the greater of—

"(1) the value of the funds or monetary instrument or instruments involved in the transaction, or

"(2) $10,000.

"(c) As used in this section—

"(1) the term 'conducts' includes but is not limited to initiating, concluding, or participating in initiating, or concluding a transaction;

"(2) the term 'transaction' includes but is not limited to a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes but is not limited to a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

"(3) the term 'monetary instruments' means coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery;

"(4) the term 'financial institution' has the definition given that term in section 5312(a)(2) of title 31,

United States Code, and the regulations promulgated thereunder;

"(5) the term 'unlawful activity' means any act or activity occurring in whole or in part in, or directed at, the United States and constituting an offense punishable by death or imprisonment for a term exceeding one year under the laws of the United States or any State of the United States in which the act or activity took place; and

"(6) the term 'reckless disregard' as used in paragraph (2) of subsection (a) means that the person is aware of a substantial risk that the monetary instruments or funds involved in the transaction represent the proceeds of, or are derived directly or indirectly from the proceeds of, any unlawful activity, but disregards the risk. A substantial risk means a risk (based on all the circumstances of the transaction including but not limited to the amount and type of funds or monetary instruments and the nature of the transaction) that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penal-

ties or affording civil remedies in addition to those provided for in this section.

"(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate.

"(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

"(1) the transaction was conducted or attempted with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, involving a violation of this title, a violation of title 26, a violation of the Controlled Substances Act (21 U.S.C. 801 et seq.), a violation of the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), a violation of section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), a violation of section 601 of the National Security Act of 1947 (50 U.S.C. 421), a violation of section 4 of title I of the Internal Security Act of 1950 (50 U.S.C. 783), a violation of section 2 of the Act of August 1, 1956 (Public Law 84-893, 50 U.S.C. 851), or a violation of sections 224-227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274-2277);

or with knowledge of the fact that the monetary instruments or funds involved in the offense represent the proceeds of, or are derived directly or indirectly from the proceeds of, any such unlawful activity;

"(2) the conduct is by a United States person or, in the case of a non-United States person, the conduct occurs in part in the United States and;

"(3) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.".

(b) The table of sections at the beginning of chapter 95 of title 18 is amended by adding at the end the following new item:

"1956. Laundering of monetary instruments".

SEC. 3. (a) Section 1113 of the Right to Financial Privacy Act of 1978 (title XI of Public Law 95-630, 12 U.S.C. 3413) is amended by adding at the end thereof the following:

"(l) Nothing in this title shall apply when a financial institution or supervisory agency, or any officer, employee, or agent of a financial institution or a supervisory agency, provides to an agency of the United States financial records which such financial institution or supervisory agency has reason to believe may be relevant—

"(1) to a possible violation of any law relating to crimes by or against financial institutions or supervisory agencies,

"(2) to a possible violation of the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or sections 1 or 3 of the Act of September 15, 1980 (21 U.S.C. 955 a and c), or

"(3) to a possible violation of a provision contained in subchapter II of chapter 53 of title 31, United States Code, or of section 1956 of title 18, United States Code.".

(b) Subsection 1112(a) of the Right to Financial Privacy Act of 1978 (title XI of Public Law 95-630, 12 U.S.C. 3412(a)) is amended to read as follows:

"(a) Nothing in this title shall apply when financial records obtained by an agency or Department of the United States are transferred to another agency or department if there is reason to believe that the records may be relevant to a matter within the jurisdiction of the receiving agency or department.".

(c) Subsection 1103(c) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3403(c)) is amended by adding at the end thereof the following: "Such information may include the name or names of and other identifying information concerning the individuals and accounts involved in and the nature of the suspected illegal activity.".

(d) Subsection 1117(c) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3417(c)) is amended to read as follows:

"(c) Any financial institution, or officer, employee or agent thereof, making a disclosure of the financial records of a customer, or information contained in such records, pursuant to this chapter in good-faith reliance upon a certificate by any Government authority, or in good-faith belief that such records or information may be relevant to a possible violation of law in accordance with subsection 3413(l) or section 3403(c) of this title, shall not be liable to the customer for such disclosure or for any failure to notify the customer of such disclosure.".

(e) Subsections (b) and (c) of section 1112 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3412) are repealed and subsections (d) and (e) of that section are redesignated subsections (b) and (c), respectively.

(f) Section 1120 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3420) is amended by striking out paragraph (1) and redesignating paragraphs (2) through (4) and any reference thereto in such paragraphs as paragraphs (1) through (3), respectively.

(g) The Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), is amended by adding at the end thereof the following new section 1123 (12 U.S.C. 3423):

"§ 3423. Preemption of State law

"The provisions of this title and any regulations promulgated thereunder shall preempt any provision of any constitution, law, or regulation of any State or political subdivision thereof, as well as any administrative or judicial interpretation of such provision, that is not identical to the provisions of this title and regulations thereunder, and that is more restrictive of disclosure to a Government authority concerning a possible violation of any statute or regulation than the provisions of this title and regulations promulgated thereunder.".

SEC. 4. Rule 17(c) of the Federal Rules of Criminal Procedure is amended by adding at the end thereof the following: "An attorney for the government may apply to the court for an order commanding the person to whom the subpoena is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the subpoena. The court shall enter such an order if it determines that (1) there is reason to believe that the books, records, documents, or other objects designated in the subpoena are relevant to a legitimate law enforcement proceeding; and (2) there is reason to believe that notification of the existence of the subpoena will result in: (A) endangering the life or physical safety of any individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.".

SEC. 5. (a) Section 5318 of title 31, United States Code, is amended to read as follows:

"§ 5318. Compliance, exemptions, and summons authority

"(a) The Secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315)—

"(1) delegate duties and powers under this subchapter to an appropriate supervising agency, except as provided in subsection (c);

"(2) require a class of domestic financial institutions to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter;

"(3) examine any books, papers, records, or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this subchapter;

"(4) summon a financial institution or an officer or employee of a financial institution, or a former officer or employee, or any person having possession, custody, or care of the reports and records required under this subchapter, to appear before the Secretary of the Treasury or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give testimony, under

oath, as may be relevant or material to an investigation described in subsection (c).

"(5) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The Secretary may revoke an exemption by actually or constructively notifying the parties affected. A revocation is effective during judicial review.

"(b) The purposes for which the Secretary of the Treasury may take any action described in paragraph (3) of subsection (a) include the purpose of civil and criminal enforcement of the provisions of this subchapter, section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b), section 411 of the National Housing Act (12 U.S.C. 1730d), or chapter 2 of Public Law 91–508.

"(c) The purpose for which the Secretary of the Treasury may take any action described in paragraph (4) of subsection (a) is limited to investigating violations of this subchapter, violations of section 21 of the Federal Insurance Act (12 U.S.C. 1829b), violations of section 411 of the National Housing Act (12 U.S.C. 1730d), or violations of chapter 2 of Public Law 91–508 for the purpose solely of civil enforcement of these provisions or any regulation issued thereunder. A summons may be issued under paragraph (4) of subsection (a) only by, or with the approval of, the Secretary of the

Treasury or a supervisory level delegate of the Secretary of the Treasury.

"(d) A summons pursuant to this section may require that books, papers, records, or other data stored or maintained at any place be produced at any designated location in any State or in any territory or other place subject to the jurisdiction of the United States not more than five hundred miles distant from any place where the financial institution operates or conducts business in the United States. Persons summoned under this section shall be paid the same fees and mileage for travel in the United States that are paid witnesses in the courts of the United States. The United States shall not be liable for any other expenses incurred in connection with the production of books, papers, records, or other data pursuant to the provisions of this section.

"(e) Service of a summons issued under this section may be by registered mail or in such other manner calculated to give actual notice as the Secretary may provide by regulation.

"(f) In the case of contumacy by or refusal to obey a summons issued to any person under this section, the Secretary shall refer the matter to the Attorney General. The Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation which gave rise to the summons is being or has been carried

on or of which the person summoned is an inhabitant, or in which he carries on business or may be found, to compel compliance with the summons. The court may issue an order requiring the person summoned to appear before the Secretary or his delegate to produce books, papers, records, and other data, to give testimony as may be necessary to explain how such material was compiled and maintained, and to pay the costs of the proceeding. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.".

(b) Section 5319 of title 31, United States Code, is amended to read as follows:

"The Secretary is authorized to make information in a report filed under this subchapter available to a Federal, State, or local agency on the agency's request. Such disclosure shall be on the terms and conditions set forth by the Secretary consistent with the purposes of this chapter. The Secretary is also authorized to make information in a report filed under this subchapter available to a Federal agency when the Secretary has reason to believe such information may be relevant to a matter within the jurisdiction of the receiving agency. The Secretary is also authorized to make disclosure of information in a report filed under this subchapter for national security purposes. A report made available

pursuant to this section and records of such reports are exempt from disclosure under section 552 of title 5.".

(c)(1) The first paragraph of subsection 5321(a) of title 31, United States Code, is amended to read as follows:

"(a)(1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), or any person causing such a violation, is liable to the United States Government for a civil penalty of not more than—

"(A) where the violation involves a failure to file a report or a material omission or misstatement in a required report, the amount of the transaction, but not more than $1,000,000, or $25,000, whichever is greater, or

"(B) for any other violation, $10,000.

For a violation of section 5318(a)(2) of this title, or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at such office, branch, or place of business at which a violation occurs or continues.".

(2) The second paragraph of subsection 5321(a) of title 31, United States Code, is amended to read as follows:

"(2) A civil penalty under paragraph (1) is reduced by an amount forfeited under subsection 5317(b).".

(3) New paragraphs (4), (5), and (6) are added at the end of subsection 5321(a) of title 31, United States Code, as follows:

"(4) A person willfully violating the provisions of section 5314 of this title or of a regulation prescribed under section 5314 is liable to the United States Government for a civil penalty of not more than—

"(A) where the violation involves a transaction, the amount of the transaction or $25,000 whichever is greater, or

"(B) where the violation involves the failure to report the existence of an account or any required identifying data pertaining to the account, the entire amount deposited into the account during the reporting year or $250,000, whichever is greater.

"(5) Any person or financial institution negligently violating any provision of this subchapter or a regulation prescribed under this subchapter is liable to the United States for a civil penalty of not more than $10,000.

"(6) A civil penalty assessed pursuant to this section is in addition to any criminal penalty under section 5322 of this title based on the same transaction.".

(d) Subsection 5321(b) of title 31 is amended to read as follows:

"(b) The Secretary may bring a civil action to recover an unpaid penalty under subsection (a) within six years from the date of the transaction on which the penalty is based.".

(e) Subsection 5321(c) of title 31 is amended to read as follows:

"(c) The Secretary of the Treasury may remit any part of a forfeiture under subsection 5317(b) of this title or may mitigate any civil penalty under subsection (a) of this section.".

(f) Subparagraph (3)(B) of subsection 5312(a) of title 31, United States Code, is amended by striking the period at the end thereof and inserting in lieu thereof: "whether or not in bearer form.".

(g) Subsection 5322(b) of title 31, United States Code, is amended by striking out the words "pattern of illegal activity involving transactions of more than $100,000" and inserting in lieu thereof "pattern of any illegal activity involving more than $100,000", and by striking out the figure "5" and by replacing in lieu thereof the figure "10".

(h) Paragraph (5) of subsection 5312(a) of title 31, United States Code, is amended to read as follows:

"(5) 'United States' means the States of the United States, the District of Columbia, and, when the

Secretary prescribes by regulation, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, any other territory or possession of the United States, or a military or diplomatic establishment.".

SEC. 6. (a) Subsection (b) of section 1952 of title 18, United States Code, is amended by deleting the word "or" before the figure "(2)", and by deleting the period at the end thereof and replacing it with the following: ", or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 of this title.".

(b) Subsection 1961(l) of title 18, United States Code, is amended by inserting the phrase "section 1956 (relating to the laundering of monetary instruments)," after the phrase "section 1955 (relating to the prohibition of illegal gambling businesses),".

(c) Subsection 2516(l) of title 18, United States Code, is amended in paragraph (c) by adding the phrase "section 1956 (laundering of monetary instruments)," after the phrase "section 1955 (prohibition of business enterprises of gambling),".

SEC. 7. Section 2 of title 18, United States Code, is amended by adding the following subsection:

"(c) Whoever knowingly facilitates the commission by another person of an offense against the United States by

providing assistance that in fact is substantial is punishable as a principal.".

SEC. 8. (a) Chapter 113 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2322. Receiving the proceeds of a crime

"Whoever receives, possesses, conceals, or disposes of, or attempts to receive, possess, conceal or dispose of, any money or other property which has been obtained in connection with a violation of any law of the United States for which the punishment may extend to imprisonment for more than one year; or brings or transfers into the United States any money or other property which has been obtained in connection with a violation of any law of a foreign country concerning the manufacture, distribution, or other form of trafficking in any substance listed in the current schedules of controlled substances established pursuant to section 202 of the Controlled Substances Act (21 U.S.C. 812) for which the punishment under the law of the foreign country may extend to imprisonment for a period of more than one year, knowing or believing the same to be money or property which has been obtained in violation of law, shall be imprisoned for not more than ten years, or fined not more than $250,000 or both.".

(b) The table of sections at the beginning of chapter 113 of title 18 is amended by adding at the end thereof the following new item:

"2322. Receiving the proceeds of a crime.".

SEC. 9. (a) Title 18 of the United States Code is amended by adding a new chapter 120 as follows:

"CHAPTER 120—FORFEITURE

"Sec.
"2600. Civil Forfeiture.
"2601. Criminal Forfeiture.

"§ 2600. Civil forfeiture

"(a) Any funds or monetary instruments involved in a violation of section 1956, and any money or other property involved in a violation of section 2322 in connection with a violation of any law of the United States or of a foreign country concerning controlled substances, and any property, real or personal, which represents the proceeds of or which is traceable to such funds, monetary instruments or other property shall be subject to forfeiture to the United States.

"(b) Any property subject to forfeiture to the United States under this section may be seized by the Attorney General, and with respect to funds or monetary instruments involved in a violation of section 1956 by the Secretary of the Treasury, upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the

property, except that seizure without such process may be made when—

"(1) the seizure is pursuant to a lawful arrest or search; or

"(2) the Attorney General or the Secretary of the Treasury, as the case may be, has probable cause to believe that the property is subject to forfeiture under this section, in which event proceedings under subsection (d) of this section shall be instituted promptly.

"(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General or the Secretary of the Treasury, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General or the Secretary of the Treasury, as the case may be, may—

"(1) place the property under seal;

"(2) remove the property to a place designated by him; or

"(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

"(d) For the purposes of this section the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions hereof, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General or the Secretary of the Treasury, as the case may be.

"(e) Notwithstanding any other provision of the law, the Attorney General or the Secretary of the Treasury, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine to—

"(1) any other Federal agency; or

"(2) any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.

The Attorney General or the Secretary of the Treasury, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General or the Secretary pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General or the Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State

or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials.

"(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(g) The filing of an indictment or information alleging a violation of law which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

"(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

"§ 2601. Criminal forfeiture

"(a) A person who is convicted of an offense under section 1956 or section 2322 of this title shall forfeit to the United States any money or other property involved in such an offense and any money or other property, real or personal, which represents the proceeds of or which is traceable to such money or property.

"(b) In any case in which money or property subject to forfeiture under subsection (a), as a result of any act or omission of the defendant—

"(1) cannot be located upon the exercise of due diligence;

"(2) has been transferred or sold to, or deposited with a third party;

"(3) has been placed beyond the jurisdiction of the court;

"(4) has been substantially diminished in value; or

"(5) has been commingled with other property which cannot be divided without difficulty;

the person shall forfeit to the United States any other property up to the value of any property described in this section.

"(c) The court, in imposing sentence on a person for a conviction of an offense listed in subsection (a), shall order that the person forfeit to the United States all property described in subsection (a) or (b).

"(d) The provisions of subsections 413 (c) and (e) through (o) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853 (c) and (e)–(o)) shall apply to property subject to forfeiture under this section, to any seizure or disposition thereof, and to any administrative or judicial proceeding in relation thereto, if not inconsistent with this section.".

(b) The chapter analysis of part I of title 18, United States Code, is amended by adding at the end thereof the following:

"120. Forfeiture ..... 2600".

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Mr. Chairman, the problem the Judiciary Committee takes up today is a difficult one. Criminals are becoming adept at funneling the proceeds of their illegal activities through America's most respected financial institutions and thereby camouflaging the actual source of those funds. This practice stymies the efforts of law enforcement to trace the funds and identify the individuals involved in the illegal activities. Thus, those who pocket the ill-gotten gains, the kingpins in criminal organizations, escape detection, and can redirect the laundered funds to new endeavors. Money laundering is clever and maddening because it effectively frustrates many criminal investigations.

In an attempt to correct the problem, several bills have been introduced that would facilitate government access to bank records. Mr. Chairman, we must cautiously review all the implications of any bill attacking money laundering. It is incumbent upon us to carefully craft such legislation so that it will assist law enforcement without unnecessarily opening up to government scrutiny the information buried in bank accounts of law-abiding citizens.

Bank accounts not only provide a profile of one's financial status, but also reveal a wealth of personal information in a way very few of us ever stop to consider. Checking accounts, loan applications, and credit cards records candidly reflect your politics, your tastes, what you owe, who you owe, where you travel and even what you eat and drink. The very richness of the information contained in bank records raises the specter of an overzealous government trampling the right to privacy in order to obtain someone's life story as told to American Express or VISA. If a government agent entered someone's home to extract the information accessible through bank records, the Fourth Amendment implications would be clear.

The Congress has traditionally demonstrated a special sensitivity to privacy rights in banking records. When the Supreme Court handed down its decision in *U.S.* v. *Miller,* 425 U.S. 435 (1976), that deprecated the Fourth Amendment implications in a search of personal financial records held by a third party, a disappointed Congress reacted with the Right to Financial Privacy Act of 1978. We responded to law enforcement's legitimate needs in a manner consistent with a citizen's right to privacy and the realities of modern finance. We must be careful not to upset the balance that we worked so hard to achieve.

Two aspects of Senate Bill 1335 illustrate how easy it would be to disrupt that balance. Under Section 3(a) of the proposed legislation, a bank could disclose information if it finds "reason to believe" that it has information relevant to the violation of certain specific laws. Thus, private banking officials would have discretion to make a highly intrusive decision. Before we ask or allow a bank to do this, let's energize the procedures provided by the Bank Secrecy Act. If we dedicate our resources to training bank personnel so that they can promptly report suspected money laundering transactions, federal agents could respond with the tools already in their possession: a court order under the Right to Financial Privacy Act—based on a government claim of relevance to an investigation—or access through a search warrant or grand jury subpoena. We should not broaden the government's power to intrude unless we are convinced that the existing tools are inadequate to the task.

We should also note that one of the specific crimes that banks would have to look out for under Section 3(a) is a newly created and broadly defined offense of money laundering. If we need to write this new offense into the U.S. Code, we must be certain to draft the statute without sweeping in financial transactions entirely unrelated to the targeted offenses. I commend to my colleagues the other money laundering bills, Senate Bills 572 and 1385, sponsored by Senators D'Amato and DeConcini, respectively, that focus more narrowly on the activities we want to proscribe.

Mr. Chairman, I mention these two areas because they highlight the dangers we confront. What information individuals choose to share with third parties should not be confused with what they choose to share, or must share, with their government. The fight against organized crime is at stake here—but so is the fundamental right to privacy of Americans. Our focus at this hearing should be to assess whether the delicate balance between these competing goals has been struck properly, and, if not, to make only those adjustments that are needed to right the scale.

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. Chairman, I commend you for holding this hearing on the subject of "money laundering" and the various Senate measures that attempt to deal with the ever-increasing problems that are involved with this illicit type of financial transaction.

Money laundering has become a widespread practice where criminals use genuine financial institutions, or other means, to convert crime-related proceeds to seemingly legitimate funds, or assets.

This abhorent practice involves billions of dollars, and therefore has a powerful adverse impact on our nation, as well as the fabric of society, as crime is facilitated and tax dollars are lost.

Although money laundering has been attacked indirectly through other criminal statues, a specific criminal offense is necessary in order to reach illegal activity that can presently evade law enforcement.

I look forward to hearing the testimony of today's distinguished witnesses as we examine this growing problem along with the legislative attempts to effectively deal with it.

Thank you Mr. Chairman.

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman, in today's hearing we will be discussing what I believe to be an important tool that is needed in the government's attempt to a dismantle illicit narcotics enterprises. The primary basis of organized crime and narcotics traffic is making money. In the course of making millions of dollars, narcotics traffickers must turn small bills into working capital. This usually involves money laundering which produces a financial trail useful to law enforcement in trying get to the top echelons of the trafficking organizations.

It is estimated that money laundering is anywhere from 50 to 100 billion dollars a year business. Focusing on money laundering activity is a crucial element in the financial investigation of major illicit businesses. I strongly support and will work with Senators Thrumond, DeConcini and D'Amato to draft a narrow statute that will prohibit money laundering. However, I will not support the Administration's proposal which is requesting broad reaching authority to establish new statutes and amend the Financial Privacy Act. Before I would consider broadening the reach of the Justice Department I would like additional evidence that they and Treasury have satisfactorily administered the current provision of the Bank Secrecy Act.

Mr. Chairman, while we are sitting here to consider the requests of the Administration to expand authority under Title 31 and reduce protections under the Financial Privacy Act, upstairs in room 324 the Senate Subcommittee on Permanent Investigations is being told by the General Accounting Office that the Treasury Department have been ineffective in enforcing the provisions of Title 31. It is my understanding that the General Accounting Office will testify that the Treasury Department lacks adequate procedures, has not devoted adequate resources and gives relatively low priority to Bank Secrecy Compliance. In a familiar tune that I have preached before, the General Accounting Office also concludes that *all* agencies involved in Bank Secrecy Act compliance must improve communication and coordination. I believe it important that all of us involved in considering these bills today review the record of the Permanent Subcommittee's hearing before moving forward on new legislation.

Mr. Chairman, in 1980 I called a hearing to examine the use of existing forfeiture statutes by the Government in the fight against organized crime and drug trafficking. The hearing was held at a time when we were being told by the Justice Department that forfeiture and financial investigations were a major element in the war on narcotics traffickers.

The bottom line from that hearing was that the existing statute which had been on the books since 1970 had seldom been used and that no one in the Justice Department had expertise in the forfeiture law. Additionally, the enforcement agencies had inaccurate records of forfeiture cases and there was little incentive to pursue forfeiture of assets investigations.

As I sit here today Mr. Chairman, I can only say it seems we have been down this road before. However, one of the outcomes of that forfeiture hearing was a commitment by the federal agencies to get their act together before coming up to the Hill and saying they need more legislation. The agencies need to demonstrate an ability to use what they already have available before requesting new law. I don't subscribe to the theory that new law automatically means better law enforcement. I'd like to know how well current law is being enforced and how amendments we already have made are being used.

My concerns about implemention of current law are heightened when I read about incompetence like that reported in March 1985. Let me quote from *Business Week*: ". . . Comptroller of the Currency, C. Todd Conover, told a stunned Senate

investigations committee that bank examiners missed irregularities at the First Bank of Boston during a special investigation in 1982. Conover's excuse: Examiners were not familiar with the specific reporting requirements as revised in 1980."

As part of the 1984 Comprehensive Crime Control Act we provided the Treasury Department with additional amendments to the Bank Secrecy Act that broaden the attempt to transport currency statute, broadened Customs search authorities, increased penalties for non-compliance by banks from $1,000 to $10,000 and prison term from 1 to 5 years, and made currency violations a predicate offense for RICO prosecution. These were all changes that were necessary and justified by the Departments of Justice and Treasury. These provisions are there to help law enforcement catch narcotics traffickers. Again, I ask, how are these statutes being used?

Mr. Chairman, at this stage I believe we should focus our attention on a narrowly drafted money laundering statute that will permit prosecution of those individuals making substantial deposits of illegally obtained currency. The need for that legislation has been established. However, before moving to the extreme measures proposed in the Administration's bill, I would need a substantial amount of justification that existing law and the recent changes to existing law in this are have failed.

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

Mr. Chairman, I introduced S. 1385, the Money Laundering Crimes and Disclosure Act of 1985, on June 27, 1985. This legislation addresses the ever-increasing problem of money laundering, especially the laundering of illicit profits generated by organized crime.

Money laundering is one of the most costly ills infecting our nation. In 1984 the President's Commission on Organized Crime reported that it was possible to launder $100 million in a single transaction. Moreover, violations of tax laws are an inevitable byproduct of laundering schemes, and this costs the nation millions of dollars in public revenue.

Modern, sophisticated money laundering techniques have contributed to the Financial success of organized crime in recent years, particularly in the narcotics trade. Without the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does. Studies cite narcotics trafficking as one of the growth industries within the underworld, and it is impossible for any American city, social or ethnic group to inoculate itself from the drug epidemic. As long as organized crime continues to successfully conceal enormous amounts of illegally generated income, our law enforcement agencies will continue to do battle with the narcotics traffickers from a position of weakness.

Money laundering techniques are used by large legitimate businesses as well. The President's Commission discovered that American corporations such as Gulf Oil, Lockheed Aircraft, and McDonnell Douglas, have engaged in illegal money laundering. Each corporation was involved in schemes to make illegal payments to foreign government officials in order to win lucrative overseas contracts. The broad array of groups participating in money laundering illustrates how widespread the problem has become.

S. 1385 deals with this problem by creating criminal and civil penalties to be imposed against anyone who initiates a transaction with the intent to promote unlawful activity or with knowledge or reason to know that the monetary instruments involved in the transaction are derived from unlawful activity guilty of the crime of money laundering. The "knowledge or reason to know" standard is well settled in criminal law and is intended to make clear that either a subjective or an objective standard of intent may be chosen for proof. Furthermore, in making Money Laundering a crime, S. 1385 does not remove certain rights to privacy by amending the Right to Financial Privacy Act. Amending the Right to Financial Privacy Act is unnecessary because the government today has access to massive amounts reports and information from financial institutions and has the authority and ability to obtain additional information. This available and potentially available information needs to be and can be put to effective use. The effective use of this information eliminates any need to infringe on any Right of Privacy.

Mr. Chairman, for the outlined reasons, I urge my colleagues who are concerned about this issue to support S. 1385.

The CHAIRMAN. I am most pleased to introduce as our first witness the honorable Alfonse D'Amato, of the Senate Committee on Banking, Housing and Urban Affairs.

Senator D'Amato, we are very pleased to have you with us. Please proceed.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, let me first commend you for holding these hearings today on a most important issue, the money laundering problem, and for attempting to develop effective legislative remedies that will strike at the heart of organized crime, the drug czars in particular. It is long overdue.

At the outset, Mr. Chairman, I would like to make two preliminary points. First, I most respectfully submit that, of all the major bills in your committee, those being considered today hold the greatest promise for crippling organized crime and major drug trafficking.

Second, I would like to stress that, with so many Senate and House money laundering bills to consider, and with all the other issues Congress must address, we run the risk of running out of time to pass any effective money laundering bill. That would be a tragedy because this Congress has a unique and historic opportunity to attack the financial empires of the drug czars and the organized crime networks.

Therefore, Mr. Chairman, I urge you to do all in your power to have a strong bill against money laundering marked up and reported out of the committee by the end of this year, and then scheduled for a vote in early 1986.

Rather than endlessly debating the technical differences among the bills, let us attempt to develop a consensus money laundering bill. Mr. Chairman, that is what you did so effectively in developing the consensus crime bill in the last Congress. In that way, I believe we can move forward. I think it is going to take that kind of effort, the same kind of effort that you were able to put together in developing last year's consensus, putting pride of authorship aside, and concentrating on the key elements.

I would like to talk today about three key elements that are contained in most bills and that are essential.

The three provisions I most strongly recommend are the very ones included in two of the bills I have sponsored, as well as, in a slightly modified form, in the bills introduced by both yourself and Senator DeConcini.

This year, the Bank of Boston, Crocker National Bank, and other Bank Secrecy Act cases, demonstrate the urgent need to: First, authorize the Treasury Department to subpoena testimony and bank records to enforce the Bank Secrecy Act; second, raise fines to the full amount of money laundered or not reported, and third, make money laundering a crime. I think, Mr. Chairman, those three essential elements should be contained in any bill.

The *Bank of Boston* case demonstrates why we need to authorize an administrative subpoena for the Treasury Department. Under questioning last March on this issue, former Assistant Secretary of the Treasury, and now Federal district court judge, John Walker, testified that the lack of such a subpoena was a major obstacle to effective law enforcement, because Treasury had no ability to audit

the examinations done by the Comptroller of the Currency. Instead, the investigation dragged on for nearly 2 years longer than it should have.

For those who say, well, this subpoena is unusual let me reply: these subpoenas are not exceptional. They exist in 40 different areas. They exist in the agricultural area, with the Civil Aeronautics Board, and the Commerce Department. Congress, the Energy Department, the Energy and Federal Regulatory Commission have them, and the list goes on and on, and I would like to submit a list of examples for your consideration.

It is simply not logical to deny the Treasury Department one of the essential tools for meeting its responsibility to enforce the law. The Treasury Department should not have to rely on the bank regulatory agencies, whose interest in Bank Secrecy Act compliance is often lukewarm at best.

Nothing demonstrates the need for higher fines more than the Bank of Boston and Crocker National Bank cases. That is why we say the present fine is inadequate.

In the first case, $1.2 billion was not reported. The fine was $500,000, or four ten-thousandths of the amount not reported. In the case of Crocker National Bank, $3.9 billion was not reported. The fine was $2.25 million, or just under six ten-thousandths of the amount not reported.

I would like to share with you what Judge Walker has said about the benefits of the higher fines contained in S. 571.

He said: "If 571 had been on the books with respect to the First National Bank of Boston, they would have stood to pay a civil penalty of over $1 billion. I think that would wake up even the sleepiest of chief executive officers."

Mr. Chairman, if I might relate some of the testimony that the officers from that First Bank of Boston gave, it was impossible to believe that they did not or should not have had knowledge as to the transactions that were taking place. There just was no enforcement. The penalties did not fit the offense. And I think we should put a stop to that kind of so-called inadvertence.

Mr. Chairman, we also need to make money laundering a crime. The current approach is completely inadequate. It attempts to combat money laundering indirectly through a little-understood reporting system. The words of one retired Bank of Boston employee should tell us all we need to know about the present system's weakness. When asked about the attitude at the branch level, he gave a very honest answer——

The CHAIRMAN. Excuse me, Senator. Do you want to take a couple more minutes to wrap up?

Senator D'AMATO. Yes, I will conclude.

He said, "If you had to stop and bang out a report for every single transaction, you would never get anything done."

If we are serious about money laundering, we should say so in terms that all bank employees, from tellers to presidents, can understand.

We should make money laundering a crime.

Mr. Chairman, as I suggested to you, I believe that you have the opportunity to force the kind of legislative approach that encompasses and embodies these three main provisions, provisions that

are contained in many of the bills that have been submitted. I think we would do the people of this country a great service in developing the tools to deal effectively with this crime and with this problem.

I thank you, Mr. Chairman, for the opportunity to testify today, and share with you this thought, that this Senator will be willing to aid in any way possible in helping you in your quest to formulate the legislative approach to deal with the problem of money laundering.

[Prepared statement and text of S. 572 and S. 1385 follow:]

PREPARED STATEMENT OF SENATOR ALFONSE D'AMATO

Mr. Chairman, I commend you for calling today's hearing to address this most important issue. As sponsor of two bills on money laundering, I am pleased that their three key elements have been folded into the Administration bill and the bill introduced by Senator DeConcini. It is on these provisions that my statement today focuses.

At the outset, Mr. Chairman, I would like to make two preliminary points. First, I respectfully submit that, of all the major bills in your Committee, those being considered today hold the greatest promise for crippling organized crime and the major drug traffickers.

Second, I want to stress that, with so many Senate and House money laundering bills to consider, and with all the other issues Congress must address, we risk running out of time to pass any money laundering bill at all. That would be a tragedy because this Congress has a unique and historic opportunity to attack the financial empires of the drug czars and the organized crime networks.

Therefore, I urge you to do all in your power to have a strong bill against money laundering marked up and reported out of Committee this year, and then scheduled for a vote early in 1986.

Rather than endlessly debate the technical differences among the bills, let us develop a Consensus Money Laundering Bill—just as you developed a Consensus Crime Bill in the last Congress—and let us have a vote on that bill as soon as possible.

The three provisions I most strongly recommend are the very ones included in the two bills I have sponsored, as well as—in slightly modified form—in the bills introduced by you and by Senator DeConcini.

This year's Bank of Boston, Crocker National Bank, and other Bank Secrecy Act cases demonstrate the urgent need to:

(1) authorize the Treasury Department to subpoena testimony and bank records to enforce the Bank Secrecy Act;

(2) raise fines to the full amount of money laundered or not reported; and

(3) make money laundering a crime.

The Bank of Boston case demonstrates why we need to authorize an administrative subpoena for the Treasury Department. Under questioning last March on this issue, former Assistant Secretary of the Treasury, and now Federal District Court Judge, John Walker testified that the lack of such a subpoena was a major obstacle to effective law enforcement. Because Treasury has no ability to audit the examinations done by the Comptroller of the Currency, he said:

"We had concerns over what we were getting back from the Comptroller. . . . We had the whole history of Florida behind us, in which we produced hundreds of indictments and convictions . . . we saw . . . the same pattern developing in Boston. And we got back . . . reports that there were no violations up there. So this would have been an ideal candidate for selective use of administrative subpoena powers . . . to go in ourselves . . . and do a spotcheck to see what we could find."

Instead, that investigation dragged on nearly two years longer than it should have.

Some people may think that my subpoena proposal is controversial because they think administrative subpoenas are a rarity. That is not the case. We use administrative subpoenas much more often than is generally known. I will submit for the record a list of over 40 sections in the U.S. Code authorizing administrative subpoenas.

To give you but a few examples, however, the Agriculture Department has an administrative subpoena power to enforce our laws on egg research and consumer in-

formation; potato research and promotion; and beef research and information; and the Commerce Department has a subpoena with regard to offshore shrimp fisheries.

If these and 40 other issues are important enough to warrant providing an Administrative subpoena power, then effective enforcement of the Bank Secrecy Act to combat the laundering of drug money is also sufficiently important.

It is simply not logical to deny the Treasury Department one of the essential tools for meeting its responsibility to enforce the law. The Treasury Department should not have to rely on the bank regulatory agencies, whose interest in Bank Secrecy Act compliance is often lukewarm at best.

Nothing demonstrates the need for higher fines more than the Bank of Boston and Crocker National Bank cases. In the first case, $1.2 billion was not reported. The fine was $500,000, or four ten-thousandth's of the amount not reported. In the case of Crocker National Bank, $3.9 billion was not reported. The fine was $2.25 million, or just under six ten-thousandth's of the amount not reported.

I would like to share with you what Judge Walker has said about the benefits of the higher fines contained in my bill, S. 571. He said:

"If 571 had been on the books with respect to the First National Bank of Boston, they would have stood to pay a civil penalty of over $1 billion. I think that would wake up even the sleepiest of chief executive officers."

Mr. Chairman, we also need to make money laundering a crime. The current approach is completely inadequate. It attempts to combat money laundering indirectly through a little-understood reporting system. The words of one retired Bank of Boston employee should tell us all we need to know about the present system's weakness. When asked about the attitude at the branch level, he gave a very honest answer. He said:

"If you had to stop and bang out a report for every single transaction, you'd never get anything done."

If we are serious about money laundering, we should say so in terms that all bank employees, from tellers to presidents, can understand. We should make money laundering a crime.

Mr. Chairman, on these and other points, today's witness will offer different standards and definitions for this Committee to consider. Their testimony with respect to "intent", "wilfulness", "negligence", "knowledge", "unlawful activity", "facilitation", "the right to financial privacy", and numerous other issues is important testimony, and I look forward to reviewing the record of this hearing very carefully.

Having said that, I again urge you to press for decisive action to resolve these differences, and avoid letting this historic opportunity slip away. If anyone can bring together the Administration, the banks, the House and Senate Judiciary Committees, and the other interests represented here today, that person is you.

Thank you again for the opportunity to appear here today. You have my commitment to do all in my power to see to it that an acceptable bill is developed this year, and that the legislation you develop becomes law.

Thank you, Mr. Chairman.

AGRICULTURE

Beef Research and Information, 7 U.S.C. 2917.
Cotton Research and Promotion, 7 U.S.C. 2115.
Egg Research and Consumer Information, 7 U.S.C. 2717.
Potato Research and Promotion, 7 U.S.C. 2622.

CIVIL AERONAUTICS BOARD

Federal Aviation Program, 49 U.S.C. 1484(b).

COMMERCE

Weather Modification Activities or Attempts: Reporting Requirements, 15 U.S.C. 330c(a).
Offshore Shrimp Fisheries, 16 U.S.C. 1100b–5(d).

CONGRESS

House Commission on Congressional Mailing Standards, 2 U.S.C. 501(f).
Technology Assessment Board, 2 U.S.C. 473(d).

CONSUMER PRODUCT SAFETY COMMISSION

Consumer Product Safety, 15 U.S.C. 2076(b).

ENERGY

Energy Conservation—Improving Energy Efficiency, 42 U.S.C. 6299(a).
Administrative Provisions, 42 U.S.C. 7255.

ENERGY/FEDERAL ENERGY REGULATORY COMMISSION

Transportation of Oil by Pipeline, 42 U.S.C. 7155 (See also 49 U.S.C. 12); 42 U.S.C. 7172(b) (See also 49 U.S.C. 12).

ENERGY/FEDERAL TRADE COMMISSION

Energy Conservation, 42 U.S.C. 6382(a) (Subpenas issued by the Comptroller General).

ENVIRONMENTAL PROTECTION AGENCY

Water Pollution Prevention and Control, 33 U.S.C. 1369(a).
Noise Control, 42 U.S.C. 4915(d).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Fair Labor Standards, 5 App. U.S.C., Reorganization Plan #1 of 1978 (See also 29 U.S.C. 209).

FEDERAL ELECTION COMMISSION

Federal Election Campaigns, 2 U.S.C. 437d(a).

FEDERAL MARITIME COMMISSION/TRANSPORTATION

Creation and Functions of Maritime Agencies, 46 U.S.C. 1124(a).

FEDERAL POWER COMMISSION

Natural Gas, 15 U.S.C. 717m(c).
Federal Regulation and Development of Power/Administrative Provisions, 16 U.S.C. 825f(b).

FEDERAL RESERVE SYSTEM—BOARD OF GOVERNORS

Bank Holding Companies, 12 U.S.C. 1844(f).

FOREIGN SERVICE IMPASSE DISPUTES PANEL

Labor Management Relations, 22 U.S.C. 4110(c).

HEALTH AND HUMAN SERVICES

Social Security—Federal Old Age, Survivors and Disability Insurance Benefits, 42 U.S.C. 405(d).
Social Security, 42 U.S.C. 1320a-4(a) Subpenas issued by the Comptroller General).

HOUSING AND URBAN DEVELOPMENT

Interstate Land Sales, 15 U.S.C. 1714(c).
Fair Housing, 42 U.S.C. 3611(a).

IMMIGRATION AND NATURALIZATION SERVICE

Immigration and Nationality—Entry and Exclusion, 8 U.S.C. 1225(a).

INTERNATIONAL TRADE COMMISSION/LABOR

Relief From Injury Caused by Import Competition, 19 U.S.C. 2321(a).

INTERSTATE COMMERCE COMMISSION

Explosives and Other Dangerous Articles, 18 U.S.C. 835(b).

Administrative/Powers, 49 U.S.C. 10321(c).

JUSTICE

Independent Counsel, 28 U.S.C. 594(a).

NATIONAL LABOR RELATIONS BOARD

Labor Management Relations, 29 U.S.C. 161.

PENSION BENEFIT GUARANTY CORPORATION

Employee Retirement Income Security Program, 29 U.S.C. 1303(b).

RAILROAD RETIREMENT BOARD

Railroad Unemployment Insurance, 45 U.S.C. 362(a).

SMALL BUSINESS ADMINISTRATION

Small Business Investment Program, 15 U.S.C. 687a(d).

SECURITIES AND EXCHANGE COMMISSION

Trust Indentures, 15 U.S.C. 77uuu(a).
Securities Exchanges, 15 U.S.C. 78u(b).
Public Utility Holding Companies, 15 U.S.C. 79r(c).
Investment Companies, 15 U.S.C. 80a-41(b).
Investment Advisors, 15 U.S.C. 80b-9(b).

WAR CLAIMS COMMISSION

War Claims, 50, App. U.S.C. 2001(c).

D'AMATO: STRICTER LEGISLATION NEEDED TO FIGHT DRUG MONEY LAUNDERING

U.S. Senator Alfonse M. D'Amato (R-C-NY) today called for quick passage of legislation to make money laundering a crime; increase penalties against banks; and give the government strengthened powers to combat this practice.

D'Amato said that the current approach to combat money laundering through a little-understood reporting system is "wholly inadequate." He added that bank officials themselves admit that laws currently on the books do not encourage the banks' cooperation in stopping this practice.

"If we are serious about money laundering, we should say so in terms that all bank and financial institution employees, from tellers to presidents, can understand," he said.

D'Amato, the author of two anti-money laundering bills (S. 571 and S. 572), called on the Senate Judiciary Committee to approve "consensus" legislation that would:

(1) Raise fines to the full amount of the money laundered;

(2) Make money laundering a federal crime; and,

(3) Authorize the Treasury Department to subpeona testimony and bank records to enforce the Bank Secrecy Act.

The Senator said that this year's Bank of Boston and Crocker National Bank cases prove the need to stiffen penalties.

In the Boston case, $1.2 billion was unreported, resulting in a fine of only $500,000. Crocker was fined a mere $2.25 billion for $3.9 billion that was not reported.

D'Amato told the committee that former Assistant Treasury Secretary and now Federal Judge John Walker has said that the specter of crippling fines would "wake up even the sleepiest of chief executive officers."

The Senator also stressed the importance of allowing the Treasury Department to subpoena testimony and records to investigate money laundering cases. "The effectiveness of money laundering investigations is greatly impaired because investigators are denied the essential tools of their trade," he said.

D'AMATO PROPOSALS TO COMBAT MONEY LAUNDERING

The first bill, the Drug Money Seizure Act (S. 571), is identical to the bill D'Amato introduced in the last Congress and is designed to strengthen provisions of the Bank Secrecy Act. It provides for:

Administrative Subpoena Power to enable the Treasury Department to systematically review suspicious cash, check, and other deposits as well as transactions to foreign banks. Current law requires Treasury to convince the Justice Department to convene a grand jury before a subpoena can be issued.

An increase in the civil penalty from $10,000 to the full amount of the transaction for institutions and employees who willfully violate the law's reporting requirements.

Creation of a penalty, up to the full amount of the foreign transaction involved, for individuals who willfully violate the law requiring reports on their transfers of money to foreign banks.

The second bill, the Money Laundering Crimes Act (S. 572), makes it a Federal crime to assist in the laundering of money in the furtherance of a crime. Penalties are stiff, with conviction of a first offense bringing a fine of $250,000 or twice the value of the monetary instruments (whichever is greater), or imprisonment for up to 10 years.

For each subsequent offense, a fine equal to $1,000,000 or five times the value of the monetary instrument will be imposed (whichever is greater), or imprisonment for up to 20 years, or both.

II

99TH CONGRESS
1ST SESSION

S. 572

To amend title 18, United States Code, to create an offense prohibiting the laundering of money in the furtherance of criminal activities.

IN THE SENATE OF THE UNITED STATES

MARCH 5 (legislative day, FEBRUARY 18), 1985

Mr. D'AMATO (for himself, Mrs. HAWKINS, Mr. PROXMIRE, Mr. ABDNOR, Mr. RIEGLE, and Mr. WILSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to create an offense prohibiting the laundering of money in the furtherance of criminal activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Money Laundering Crimes Act".

SEC. 2. (a) Chapter 95 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1956. Laundering of monetary instruments

"(a) Whoever conducts or causes to be conducted a transaction or series of transactions involving one or more monetary instruments in, through, or by a financial institution which is engaged in, or the activities of which affect, interstate commerce, or attempts so to do—

"(1) with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity; or

"(2) with knowledge or reason to know that such monetary instruments represent income derived, directly or indirectly, from any unlawful activity, or the proceeds of such income,

shall be fined not more than $250,000 or twice the value of the monetary instruments, whichever is greater, or imprisoned not more than ten years, or both, for the first such offense, and shall be fined not more than $1,000,000 or five times the value of the monetary instruments, whichever is greater, or imprisoned not more than twenty years, or both, for each such offense thereafter.

"(b) As used in this section—

"(1) the term 'conducts' includes initiating, concluding, or participating in conducting, initiating, or concluding a transaction;

"(2) the term 'transaction' includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

"(3) the term 'monetary instruments' means monetary instruments as defined in section 203(1) of the Currency and Foreign Transactions Reporting Act, as revised (31 U.S.C. 5312(a)(3));

"(4) the term 'financial institution' means financial institution as defined in section 203(e) of the Currency and Foreign Transactions Reporting Act, as revised (31 U.S.C. 5312(a)(2)); and

"(5) the term 'unlawful activity' means any act or acts constituting—

"(A) a pattern of racketeering activity or collection of unlawful debt, as those terms are defined in section 901(a) of the Organized Crime Control Act of 1970 (18 U.S.C. 1961–1968);

"(B) a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

"(C) an offense under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to bribery in sporting contests), sections 471–473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the offense is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce by threats or violence), section 1952 (relating to racketeering enterprises), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unfair welfare fund payments), section 1955 (relating to prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen proper-

ty), sections 2341–2346 (relating to trafficking in contraband cigarettes), or sections 2421–2424 (relating to white slave traffic);

"(D) an offense under title 29, United States Code, section 186 (relating to restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or

"(E) an offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

"(c) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

"(d) Violations of this section shall be investigated by the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Internal Revenue Service, as appropriate.

"(e) There is extraterritorial jurisdiction over the conduct prohibited by this section.".

(b) The table of sections at the beginning of chapter 95 of title 18 is amended by adding at the end the following new item:

"1956. Laundering of monetary instruments".

II

99TH CONGRESS
1ST SESSION

S. 1385

Entitled the "Money Laundering Crimes and Disclosure Act of 1985".

IN THE SENATE OF THE UNITED STATES

JUNE 27 (legislative day, JUNE 26), 1985

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

Entitled the "Money Laundering Crimes and Disclosure Act of 1985".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Money Laundering Crimes and Disclosure Act of 1985".

SEC. 2. (a) Chapter 95 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1956. Laundering of monetary instruments

"(a) Whoever initiates or causes to be initiated a transaction or series of transactions involving one or more monetary instruments in, or through a financial institution which is

engaged in, or the activities of which affect, interstate commerce, or attempts to do so—

"(1) with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity; or

"(2) with knowledge or reason to know that such monetary instruments represent income derived, directly or indirectly, from any unlawful activity, or the proceeds of such income, shall be fined not more than $250,000 or twice the value of the monetary instruments, whichever is greater, or imprisoned not more than ten years, or both, for the first such offense, and shall be fined not more than $1,000,000 or five times the value of the monetary instruments, whichever is greater, or imprisoned not more than twenty years, or both, for each such offense thereafter.

"(b) As used in this section—

"(1) the term 'conducts' includes commencing, concluding, or participating in the commencement or conclusion of a transaction;

"(2) the term 'transaction' includes a deposit, withdrawal, transfer between accounts, exchange of currency, obtaining a loan or an extension of credit, purchase or sale of any stock, bond, certificate of de-

posit, or other monetary instrument, or any other payment, transfer, or delivery through or to a financial institution, by whatever means effected;

"(3) the term 'monetary instruments' means monetary instruments as defined in section 5312(A)(3) of title 31;

"(4) the term 'financial institution' means financial institution as defined in section 5312(a)(2) of title 31; and

"(5) the term 'unlawful activity' means any act or acts constituting—

"(A) a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

"(B) an offense under any of sections 201 (relating to bribery), 224 (relating to bribery in sporting contests), 471–473 (relating to counterfeiting), 659 (relating to theft from interstate shipment) if the offense is felonious, 664 (relating to embezzlement from pension and welfare funds), 891–894 (relating to extortionate credit transactions), 1084 (relating to the transmission of gambling information), 1341 (relating to mail fraud), 1343 (relating to wire fraud), 1461–1465 (relating to obscene matter), 1503 (relating to obstruction

of justice), 1510 (relating to obstruction of criminal investigations), 1511 (relating to obstruction of State or local law enforcement), 1951 (relating to interference with commerce by threats or violence), 1952 (relating to racketeering enterprises), 1953 (relating to interstate transportation of wagering paraphernalia), 1954 (relating to unfair welfare fund payments), 1955 (relating to prohibition of illegal gambling businesses), 2314 or 2315 (relating to interstate transportation of stolen property), 2341–2346 (relating to trafficking in contraband cigarettes), or 2421–2424 (relating to white slave traffic) of this title;

"(C) an offense under section 302 (relating to restrictions on payments and loans to labor organizations) of the Labor Management Relations Act, 1947 (29 U.S.C. 186) or section 501(c) (relating to embezzlement from union funds) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 501(c)); or

"(D) an offense involving the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

"(c) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

"(d) Violations of this section shall be investigated by the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Internal Revenue Service, as appropriate.

"(e) There is extraterritorial jurisdiction over the conduct prohibited by this section.".

(b) The table of sections at the beginning of chapter 95 of title 18, United States Code, is amended by adding at the end the following new item:

"1956. Laundering of monetary instruments.".

SEC. 3. Section 5318 of title 31, United States Code, is amended to read as follows:

"§ 5318. Compliance and exemptions

"(a) The Secretary of the Treasury may (except under section 5315 of this title and regulations prescribed under section 5315)—

"(1) delegate duties and powers under this subchapter to an appropriate supervisory agency;

"(2) require a class of domestic financial institutions to maintain appropriate procedures to ensure compliance with this subchapter and regulations prescribed under this subchapter;

"(3) prescribe an appropriate exemption from a requirement under this subchapter and regulations prescribed under this subchapter. The financial institution must provide on a quarterly basis to the Secretary of the Treasury a list of the customers of the financial institution whose transactions have been exempted in accordance with the provisions of the regulations prescribed under this subchapter. The Secretary of the Treasury must review and approve or revoke the list of exemptions within 90 days after the date of receipt. Upon revocation, a financial institution shall file the usual reports as prescribed under section 5314 with respect to any customer whose exemption has been revoked. The financial institution may consider the exempt list approved for purposes of this subchapter, unless notified in writing to the contrary by the Secretary of the Treasury within the 90-day period.

"(4)(A) examine any books, papers, records, or other data of domestic financial institutions pursuant to the recordkeeping and reporting requirements under this subchapter;

"(B) summon an officer or employees of a domestic financial institution, or any person having possession, custody, or care of the reports or records required under this subchapter, to appear before the Secretary

of the Treasury or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony under oath, as may be relevant material to such inquiry; and

"(C) take such testimony of the officer, employee or person having possession of the relevant reports or records, under oath, as may be relevant or material to such inquiry.

"(b) The purposes for which the Secretary of the Treasury may take any action described in subsection (a)(4) include the purpose of investigating any offense connected with the administration or enforcement of this subchapter, section 21 of the Federal Deposit Insurance Act, section 411 of the National Housing Act, or chapter 2 of Public Law 91–508.

"(c)(1) The Secretary of the Treasury may delegate the powers conferred by subsection a(4) to an appropriate supervisory agency.

"(2) A summons may be issued under subsection a(4)(B) only by, or with the approval of, the Secretary of the Treasury or a supervisory level delegate of an appropriate Treasury bureau, pursuant to title 12, United States Code, sections 3401 through 3422, 12 U.S.C. section 3401–3422.".

SEC. 4. Section 5321 of title 31, United States Code, is amended to read as follows:

"§ 5321. Civil penalties

"(a) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) or causing such a violation is liable to the United States Government for a civil penalty of not more than:

"(1) The amount of the transaction where the violation involves a transaction reporting requirement; or

"(2) 10,000 for any other violation.

"(b) For violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

"(c) A person willfully violating the provisions of section 5314 of this title or of a regulation prescribed under section 5314 is liable to the United States Government for a civil penalty of not more than the amount of the foreign transaction or foreign account involved in the violation.".

SEC. 5. Section 5322 of title 31, United States Code, is amended to read as follows:

"(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section

5315) shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

"(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of this United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $1,000,000, imprisoned for not more than 20 years, or both.

"(c) For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.".

The CHAIRMAN. Thank you very much, Senator. I have just one question.

Senator D'Amato, I believe you have introduced S. 571, the Drug Money Seizure Act. That bill is not before our committee, but could you comment on specifically what that bill does?

Senator D'AMATO. Specifically, we touch on the three areas, Mr. Chairman. We say that the Treasury Department should be given that administrative subpoena power. We believe in this manner, we will be able to act much more expeditiously, and we would not have the kind of runaway situation that took place in the *First Bank of Boston* case.

It provides administrative subpoena power, No. 1. Second, it increases the civil penalty from $10,000 to the full amount of the transaction for those institutions and employees who willfully violate the law. So that where you have employees or a bank or a financial institution that demonstrates a callous disregard for the law, they will be subject to a penalty equal to all the money that they have helped facilitate in transferring illegally. And third, we create a penalty up to the full amount of the foreign transaction involved for individuals who willfully violate the law. We require reporting of these transfers of moneys to foreign banks.

Mr. Chairman, in S. 572 we make money laundering a crime. The people who are laundering drug moneys certainly are part of that criminal enterprise, and they should be held accountable. There should be more than just a civil penalty. For those who are in the business of money laundering, there should be criminal sanctions as well.

The CHAIRMAN. Thank you very much.

Senator D'AMATO. Thank you very much, Mr. Chairman.

The CHAIRMAN. Our next witnesses are Mr. Stephen Trott, Assistant Attorney General, Criminal Division, Department of Justice, and Mr. David Queen, Acting Assistant Secretary for Enforcement and Operations, Department of the Treasury.

Gentlemen, we will be glad to hear from you. As we have previously notified the witnesses, we are allowing 5 minutes for your summary, and then we can ask questions.

Mr. Trott, you may proceed.

STATEMENT OF A PANEL, INCLUDING: STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; AND DAVID D. QUEEN, ACTING ASSISTANT SECRETARY FOR ENFORCEMENT AND OPERATIONS, DEPARTMENT OF THE TREASURY

Mr. TROTT. Thank you, Mr. Chairman.

As you know, and as the witnesses will continue to tell you, money laundering is a big business. Just how big, nobody knows for sure, because drug rings and organized crime families do not prepare annual reports. But the Treasury Department has estimated that, unfortunately, Americans spend more than $80 billion a year just to buy illegal drugs.

A recent Wall Street Journal article which editorially supported the administration's money laundering bill that I will be describing in a second, contains an estimate of somewhere in the neighbor-

hood of $150 billion generated each year by drugs, gambling, and vice in general.

Consequently, this administration has determinated that what is needed is new legislation to directly prohibit the laundering of money. Senator D'Amato is correct, that activity must be made a crime.

Just as we successfully attacked racketeering with RICO legislation, making racketeering itself a crime, now we must attack money laundering by making money laundering itself a crime. The type of criminals at whom this legislation is directed are in the business for one purpose, and one purpose only: to get rich quick. And what we are doing by drafting the legislation as we have is to create a tool by which this activity can be curtailed.

The Bank Secrecy Act, while an effective law enforcement tool in some respects, is simply not enough, standing alone, to combat money laundering. As long as currency transactions are properly reported, the Secrecy Act itself contains no sanctions for washing dirty money. Consequently, we think that a new provision should be added to title 18, making it an offense to conduct or attempt to conduct a transaction involving monetary instruments, or the wire transfer of funds, if that transaction affects interstate or foreign commerce, or is conducted through a financial institution, the activities of which affect interstate or foreign commerce, provided that the Government can show either of the following: first, that the person acted with the intent to promote, manage, establish, carry on or facilitate an unlawful activity—defined as a State or Federal felony—or second, that the person knew or acted in reckless disregard of the fact that the monetary instruments or funds represent the proceeds of or are derived from the proceeds of an unlawful activity.

Some other provisions in the administration's bill are very important. For example, section 7 of S. 1335 would add a new criminal facilitation offense to title 18. This would accomplish something that has been questionable under Federal law and enable us to go after people who are facilitating the commission of crimes.

In short, one who provides substantial assistance to another in the commission of an offense engages in reprehensible conduct which should subject him to criminal liability as a principal.

In addition to setting out new offenses and other sanctions, S. 1335 also contains several provisions designed to make easier the investigation of money laundering and the tracing of the proceeds of crime.

Section 3 amends the Right to Financial Privacy Act to define and clarify further the extent to which financial institutions may cooperate with Federal law enforcement authorities in providing information which is relevant to crimes by or against financial institutions, violations of the Bank Secrecy Act in title 31, violations of the new money laundering offense, and violations of certain serious drug crimes.

Section 4 contains an analogous provision that would amend rule 17(c) to clarify the authority of U.S. district courts to issue orders commanding a person to whom a subpoena is directed not to notify for a specified period any other person of the existence of the subpoena.

Mr. Chairman, we strongly support this. We think that this bill will enable us to cripple the money laundering activities that underlie much of the serious crime in this country, and I would be pleased to answer any questions that you or any members of the committee might have.

[Statement follows:]

Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and Members of the Committee, I am pleased to be here today to present the views of the Department of Justice on one of the biggest problems presently facing law enforcement, the laundering of money derived from criminal activity. Let me say initially that this is a difficult and complex subject as evidenced in part by the large number of bills that have been introduced. Today I am going to discuss three of those bills, S. 1335, S. 1385 and S. 572. The former bill was prepared by the Departments of Justice and Treasury and in our judgment represents the most effective legislative response to those who would seek to gain by dealing in the profits of crime.

As the Committee knows, money laundering -- the process by which one conceals the existence, illegal source, or illegal application of income and then disguises the source of that income to make it appear legitimate -- is big business. Just how big nobody knows for sure because drug rings and organized crime families don't prepare annual reports, but the Treasury Department has estimated that Americans spend more than $80 billion each year to buy illegal drugs. Sales of $80 billion would make the illegal drug trade a bigger operation than all but one of the Fortune 500 companies, larger even than General Motors. And that is just from drug trafficking. A recent Wall Street Journal article -- which editorially supported the Administration's money

laundering bill that I will be describing in a minute -- contains an estimate that somewhere in the neighborhood of $150 billion is generated each year by drugs, gambling, and vice in general. We ourselves are unable to determine exactly how much is laundered, but obviously it is a multi-billion dollar figure.

The Attorney General summed up the problem earlier this year when he described money laundering as "the life blood of the drug syndicates and traditional organized crime." Unfortunately, this problem has grown in size and complexity. More people are involved, there is more money being laundered, and the schemes to wash "dirty money" are now often so sophisticated that they involve an intricate web of domestic and foreign bank accounts, shell corporations, and other business entities through which funds are moved by high speed electronic fund transfers.

Perhaps even more disturbing is the increasing willingness of professional persons such as lawyers, accountants, and bankers at all levels from tellers to senior officials to become active participants in money laundering. While some criminal organizations still wash their own illegally generated money by such relatively crude methods as one of their members' smuggling a suitcase full of currency out of the country for deposit in an offshore bank, a number of drug rings and other criminal syndicates now hire professionals to launder the money produced by their operations.

Consequently, this Administration has determined that what is needed is new legislation to directly prohibit the laundering of money. The three bills that I will be discussing today all would create such an offense. Before I do that, however, I think it would be helpful to review some of their background.

As you know, on July 28, 1983, the President established the Commission on Organized Crime. Among its other responsibilities, the Commission was charged with reporting to the President from time to time -- with a final report to be submitted by March 1, 1986 -- and with making recommendations concerning any

legislative changes needed to better combat organized crime and to improve the administration of justice. In October of 1984, the Commission issued an interim report to the President and the Attorney General dealing specifically with money laundering. Entitled The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering, the report graphically illustrated the problem and set out draft legislation designed to deal with it. The suggested legislation contained a new money laundering offense in title 18, amendments to the Currency and Foreign Transactions Reporting Act in title 31, and Amendments to the Right to Financial Privacy Act located in title 12. 1/

The Department of Justice and the Treasury Department have thoroughly reviewed the proposals drafted by the Commission on Organized Crime and analyzed them in light of our experiences in investigating and prosecuting money laundering cases around the country. While the recommendations of the Commission provided an excellent starting point, we concluded that modifications and refinements were needed in a number of areas, and that certain additional provisions and offenses not discussed by the Commission would also be of great assistance in combatting money launderers.

Of primary importance is our agreement with the Commission that a new offense dealing specifically with money laundering is needed in title 18. As the Committee knows, at the present time we do not have such a statute and most prosecutions for this offense are brought under the Bank Secrecy Act provisions in title 31 that require the filing of various reports concerning certain monetary transactions with financial institutions and which punish the failure to file the reports or to do so truthfully.

That this approach is no longer adequate is vividly illustrated by a recent investigation of large scale money laundering in Puerto Rico. That situation involved a loose network of local financial institutions and illegal lottery

ticket dealers known as "acapadores." The gist of the scheme was that the "acapadores" would buy winning lottery tickets from legitimate winners of the Puerto Rico lottery for a slight premium plus the value of the tickets. In turn, they would sell these winning tickets for a higher price to "clients" wishing to hide illicit income. While some of the "acapadores'" conduct was punishable under local law, most of it was not prosecutable under current federal law.

For example, when the "acapadore" accepts substantial amounts of currency from a narcotics trafficker and gives the trafficker a winning lottery ticket, his conduct is not punishable under the Bank Secrecy Act. Before the government can prosecute an "acapadore" we would have to establish that he has been operating as a financial institution as this term is defined in the law. More importantly, and certainly more difficult to do, we would have to prove that the "acapadore" knew about the law, that his activity was covered under the law, and that he knew about his obligation to file the necessary reports and to keep records of his transactions. Further, we have no effective law with which to prosecute employees of businesses other than banks because of the necessity of proving that they were acting as employees of a financial institution and that therefore they had the obligation to file the required reports.

Simply put, the Bank Secrecy Act, while an effective law enforcement tool, is not enough, standing alone, to combat money laundering. As long as currency transactions are properly reported, the Bank Secrecy Act contains no sanction for washing dirty money. Consequently we think that a new provision should be added to title 18 making it an offense to conduct or attempt to conduct a transaction involving monetary instruments or the wire transfer of funds, if the transaction affects interstate or foreign commerce or is conducted through a financial institution the activities of which affect interstate or foreign commerce, provided that the government can show either of the following: first, that the person acted with the intent to promote, manage,

establish, carry on, or facilitate an unlawful activity (defined as a state or federal felony), or, second, that the person knew or acted in reckless disregard of the fact that the monetary instruments or funds represent the proceeds of or are derived from the proceeds of an unlawful activity.

We have carefully drafted our bill, S. 1335, to include not only the person who, for example, deposits cash representing the proceeds of an unlawful drug transaction in a bank or uses such "dirty money" to buy a new car, but also the bank employee or car salesman who participated in the transaction by accepting the money if such a person can be proved to have known or to have acted in reckless disregard of the fact that the money involved was derived from criminal activity. Such persons, and in particular the employees of banks and other financial institutions who knowingly or recklessly help criminals dispose of the fruits of their crimes, facilitate criminal activity and are as deserving of punishment as the drug dealer or loan shark who brings them their ill-gotten cash or other monetary instruments derived from their cash. 2/

The punishment for the new money laundering offense which we have proposed is appropriately severe: imprisonment for up to twenty years and a fine of up to the greater of $250,000 or twice the amount of money involved in the offense. S. 1335 also provides for a civil penalty of up to the greater of $10,000 or the amount involved in the transaction, and for the forfeiture of all funds involved in the offense. The civil penalty and the forfeiture provisions would be in addition to any fine imposed for a criminal conviction. In short, we intend to make the laundering of money derived from criminal activity an expensive proposition for those who would try it.

One aspect of the new money laundering offense which merits particular attention is the coverage of one who cannot be shown to have actual knowledge that the money he or she receives or handles in a transaction was derived from a crime but who acts in

"reckless disregard" of the fact that the money was so obtained. Increasingly, with the enormous money derived from narcotics trafficking and organized crime, money launderers are persons such as lawyers and bankers who, for a price, launder money that is clearly the proceeds of a crime even though it cannot be proven that they have actual knowledge of its source.

Consider, for example, this actual case in the Southern District of Florida in 1982: One Beno Ghitis, a foreign national who operated a money exchange business in South America, opened an account in the Capital Bank in Miami in the name of an entity called Sonal. An agent of Ghitis, a person named Victor Eisenstein, deposited $242 million in cash in the Sonal account between January and August of 1981, most of it brought in in cardboard boxes and duffel bags. For handling the Sonal account, the bank charged a "service fee" of 1/8 of 1 percent of the total deposits which was subsequently raised to ¼ of 1 percent and then to a flat "fee" of $300,000 per month. In civil forfeiture actions brought against some of the money in the Sonal account and against some found in Eisenstein's office, the District Court found that although there was no indication that any of the principals were engaged in drug transactions, the volume, frequency, and other circumstances surrounding the cash deposits were such that Ghitis, Eisenstein, and others involved knew or should have known that the cash involved was drug tainted. Hence, nearly $8 million was forfeited to the government, $4,255,625.39 in the Sonal account and $3,686,639 found in Eisenstein's office which he had conveniently rented in the same building as the branch of the Capital Bank where he made most of his deposits. 3/ While the forfeiture of the money was most welcome, in our view this activity is deserving of criminal prosecution and a sentence of imprisonment. Any new money laundering offense that would not reach this kind of egregious conduct would be inadequate to address the real problem with which we are concerned.

Or take the hypothetical case of an attorney who, for a $50,000 fee, accepts a suitcase containing $500,000 in currency from a person who he knows is employed as a construction worker with instructions to deposit it in small amounts in several different banks in his own name and then wire the money in each of the accounts to the worker's bank account in a foreign country. As another example, consider a bank employee who, for the same ten percent fee, accepts the whole suitcase of cash from the construction laborer, distributes it among several accounts set up by the laborer, and then wire transfers it to the foreign Bank.

Most persons would agree that in these examples there is such a substantial risk that the money is derived from a crime that the attorney and the banker are acting reprehensibly in accepting it with "no questions asked." To ignore this risk is to act in reckless disregard of the fact that the money represents the proceeds of a crime. If such a "reckless disregard" standard were not included, persons such as those in the examples I have just described who were willfully blind to the obvious source of the money involved could not be prosecuted.

Accordingly, the term "reckless disregard" is defined in the new money laundering offense as an awareness of facts and circumstances that lead the person to believe that a substantial risk exists that the monetary instruments involved in the transaction represent the proceeds of, or are derived from, an unlawful activity, coupled with his conscious disregard of the risk in a manner that constitutes a gross deviation from the standard of care that a reasonable person would exercise under the circumstances. The term "reckless disregard" is used in at least three other statutes in title 18 4/ and is to be contrasted sharply with a mere "reason to know" or "negligence" standard which was recommended by the Commission on Organized Crime. After

careful consideration, we concluded that a "reason to know" standard was not suitable for subjecting a person to either the serious criminal or civil sanctions set out in the new money laundering offense. 5/

Turning now to other provisions in the Administration's bill which are of primary concern to this Committee, section seven of S. 1335 would add a new criminal facilitation offense to title 18. It would accomplish this by adding a new subsection (c) to 18 U.S.C. 2 to provide that "whoever knowingly facilitates the commission by another person of an offense against the United States by providing assistance that is in fact substantial is punishable as a principal." This offense would not be limited just to money laundering but would be particularly applicable to money launderers. For example, the new offense would be committed by one who, for a fee, took currency that he knew was derived from a drug sale and exchanged it for cashier's checks to return to the drug dealer although the person took no part in the drug sale and was indifferent as to the source of the money. It would also be committed by a chemist who manufactures and sells a lawful but difficult to obtain ingredient to a person who he knows intends to use it to produce a controlled substance.

In short, one who provides substantial assistance to another in the commission of an offense engages in reprehensible conduct which should subject him to criminal liability as a principal. Yet some courts have held that such a person is not guilty as an aider and abettor under 18 U.S.C. 2(a) unless he consciously intends to make the criminal venture succeed. Other courts have held, however, that a person who knowingly furnishes material assistance such as bribe money or goods to a person who he is aware intends to use them in a crime has sufficient scienter for criminal liability under 18 U.S.C. 2. 6/ The facilitation offense is intended to clarify the case law to ensure that one who knowingly furnishes such assistance to a criminal is punishable.

Section eight of S. 1335 is also not confined strictly to money laundering but, like section seven, would be particularly

useful in dealing with those who handle "dirty money." It would add a new section 2322 to title 18 setting out two related, but distinct, offenses. The first offense is knowingly receiving the proceeds of any federal felony. The offense would be committed, for example, by a money launderer who received the proceeds of any federal crime.

The second offense is bringing into the United States any money or other property which has been obtained in connection with the violation of any law of a foreign country proscribing narcotics trafficking for which the punishment under the foreign law is imprisonment for more than one year. This offense is intended to reach those foreign drug traffickers who would look to the United States as a place in which to invest their illegal profits and to insure that the United States does not become a haven for such activity.

It is interesting to note that both Canada and Switzerland have analogous provisions in their laws. Just last month in Switzerland, three men were convicted and jailed for laundering $47 million obtained from heroin sales in United States pizza parlors. The scheme involved some 500 people in Switzerland, New York, Italy, and Turkey, who sold some $1.65 billion worth of heroin through the so-called "pizza connection." The sentences imposed ranged from two to 13 years, and the men were fined a total of $82,000.

Section nine of our bill sets out a new chapter 202 in title 18 dealing with criminal and civil forfeitures. (It is drafted in such a way that is is easily modifiable if at some later time the Congress thought another title 18 offense ought to have a forfeiture remedy). It provides for the civil forfeiture of all funds or monetary instruments involved in the violation of the money laundering offense, and of the receiving proceeds offense if the proceeds were obtained in violation of either a federal or foreign felony provision pertaining to controlled substances. The provisions for accomplishing civil forfeitures are patterned

after the civil forfeiture provisions in title 21. The new chapter also provides for the criminal forfeiture of money or other property involved in a violation of the money laundering or receiving proceeds offense. Criminal forfeiture would apply to any violation of the new receiving proceeds offense, not just the receiving of money or property derived from a drug crime.

In addition to setting out new offenses and other sanctions, S. 1335 also contains several provisions designed to make easier the investigation of money laundering and the tracing of the proceeds of crime. 7/ These amendments generally concern the Currency and Foreign Transactions Reporting Act in title 31 and the Right to Financial Privacy Act in title 12 and will be discussed in further detail by Mr. Queen. However, I would point out that S. 1335 contains a procedural provision in section four that is a matter of concern to this Committee. Section four essentially complements the amendments to the Right to Financial Privacy Act made in section three.

Section three would amend the Right to Financial Privacy Act to define and clarify further the extent to which financial institutions may cooperate with federal law enforcement authorities in providing information which is relevant to crimes by or against financial institutions, violations of the Bank Secrecy Act in title 31, 8/ violations of the new money laundering offense, and violations of certain serious drug crimes. The effect of this amendment to the RFPA is to allow a bank or other financial institution to provide information which it has reason to believe may be relevant to one of these crimes without risking civil liability under the Act or entailing any obligation to notify the customer of such cooperation which the Act requires.

Section four contains an analogous provision that would amend Rule 17(c) of the Federal Rules of Criminal Procedure to clarify the authority of the United States District Courts to issue orders commanding a person to whom a subpoena duces tecum

is directed not to notify, for a specified period, any other person of the existence of the subpoena. Like the amendment to the Right to Financial Privacy Act negating the financial institution's obligation in certain situations to notify the customer that it has provided evidence of crime to law enforcement authorities, this provision is intended to prevent disclosure by third party record holders, such as banks, of legitimate law enforcement interest in the records subpoenaed by a grand jury. Such premature disclosure obviously has a high potential for impairing the investigation and should not be tolerated.

Mr. Chairman, that concludes my discussion of the Administration's bill, S. 1335, and I would now like to address some features of the money laundering and related provisions in the other bills before the Committee, S. 572 and S. 1385.

Both S. 572 and S. 1285 are derived from the new money laundering offense recommended by the President's Commission on Organized Crime. In fact, S. 572 is virtually identical to the money laundering offense drafted by the Commission. While, as I have indicated, S. 1335 is also derived in part from this approach, there are significant differences.

First, the money laundering offense in S. 572 and S. 1385 would be limited to money laundering through financial institutions. S. 1385 also contains a very significant further restriction. It states the offense as "initiating or causing to be initiated a transaction ... involving monetary instruments in, or through a financial institution ..." The effect, if not the intent, of this provision may be to exclude financial institutions from the coverage of the new provision and reach only bank customers. 9/ This result is unacceptable. Events of the past few years have vividly illustrated that banks should be clearly covered by any new money laundering offense.

Even the approach of S. 572 of covering both banks and bank customers is too restrictive as it would not reach money laundering by such methods as directly purchasing businesses,

real estate, jewelry, etc. Nor would it help in an actual case which I can describe only generally because certain aspects of it are unresolved. In this case an attorney, whose clients were drug traffickers who generated large amounts of cash, hired a private investigator to receive, hold, and distribute the cash at the attorney's direction. In fact, well over $1,000,000 of this money was handled by the investigator in a six month period. Some of it was used to acquire boats, aircraft, and real estate and to make improvemnets to this property. In our view, the new money laundering offense should be applicable to cases such as this even though a financial institution was not involved. Accordingly, the money laundering offense in the Administration's bill, S. 1335, would apply whenever the transaction involving the proceeds of a crime can be shown to affect interstate or foreign commerce or to be conducted through a financial institution which is engaged in or the activities of which affect interstate commerce.

Second, as I have already discussed, the scienter standard in S. 572 and S. 1385 is too broad. These bills would punish one who was merely negligent in engaging in a transaction involving the proceeds of a crime. Although negligence in this area is certainly reprehensible, we think criminal liability should be reserved for persons who had actual knowledge that the funds involved were derived from a crime or who acted in reckless disregard of that fact.

Third, S. 572 and S. 1385 would only proscribe the laundering of money derived from certain listed federal felonies. While both lists are long and cover offenses most likely to produce "dirty money" -- they differ slightly but both closely follow the list of crimes that are predicate offenses for the RICO statute, 18 U.S.C. 1961 -- we can see no valid reason to limit the offense to laundering money derived from these crimes while not covering money derived from such heinous federal offenses as Presidential assassination and espionage, and such state offenses as gambling and prostitution. In short, we would

prefer the new money laundering offense to cover the proceeds of any federal or state felony. While it is true that the states could enact their own money laundering statutes to cover state offenses, we believe a federal statute is needed to cover those situations in which the laundering occurs in another state or even, under the extraterritorial provision, in another country.

Fourth, S. 572 and S. 1385 describe the offense as conducting "a transaction or series of transactions." By contrast, the Administration's bill eliminates the reference to a "series of transactions" because such a phrase makes the inclusion of multiple counts in an indictment more difficult and may allow certain money launderers to escape deserved punishment by casting several different crimes as but one.

Fifth, S. 1335, the Administration's bill, would reach money laundering through wire transfers, whereas S. 572 and S. 1385 would not. Both of these bills are limited to transactions involving monetary instruments which excludes the coverage of wire transferred funds. This is a potentially serious omission in light of the use of wire transfers in sending unlawfully obtained money out of the country and returning it thereafter.

Finally, the Administration's bill contains forfeiture and civil penalty provisions while S. 572 and S. 1385 do not.

I note, Mr. Chairman, that S. 1385 also contains various amendments to the Bank Secrecy Act in Title 31. These parts of the bill are of primary concern to the Treasury Department and Mr. Queen will be discussing them in some detail. But let me just say generally that we believe broader changes in the Bank Secrecy Act are needed than those set out in S. 1385 or in S. 571, a companion bill to S. 572. Most important, the Act needs to be revised to allow the Treasury Department to share more efficiently the information it obtains in reports filed under the Act with other federal and state law enforcement agencies. S.1335, the Administration's bill, adopts such a comprehensive approach. While many of the amendments to Title 31 in our bill

are technical, staff members of the Justice and Treasury Departments are available to explain them to the Committee staff should you so desire.

In sum, Mr. Chairman, while we appreciate the introduction of bills such as S. 572 and S. 1385, which by and large contain recommendations of the Organized Crime Commission, we believe that our study of all of these bills and intensive consultation with all concerned federal agencies have enabled us to produce the type of comprehensive legislation that is needed in this area. We hope that the Administration's bill, S. 1335, will be carefully considered and then expeditiously processed.

Mr. Chairman, that concludes my prepared statement and I would be happy to answer any questions at this time.

FOOTNOTES

1/ The Commission recommended other measures, such as a new bank bribery statute and an amendment of the federal wiretapping statute (18 U.S.C. 2510 et seq.) to allow law enforcement authorities to seek court orders authorizing the interception of communications involving criminal violations of the Currency and Foreign Transactions Reporting Act, which were enacted as part of the Comprehensive Crime Control Act of 1984 (P.L. 98-473). Moreover, a number of its recommended amendments to the Currency and Foreign Transactions Reporting Act, such as greatly increased fine levels and the addition of an attempt provision, were also enacted as part of the Comprehensive Crime Control Act.

2/ S. 1335 would not apply to duly authorized government law enforcement or intelligence activities such as FBI undercover operations routinely described in annual appropriations bills. See, e.g., section 203(b) of P.L. 98-411 (98 Stat.1545, 1559).

3/ United States v. $4,255,625.39, 551 F. Supp. 314 (S.D. Fla. 1982), aff'd 762 F. 2d 895 (11th Cir. 1985).

4/ See 18 U.S.C. 1365, proscribing the tampering with consumer products; 18 U.S.C. 33, concerning the destruction of motor vehicles; and 18 U.S.C. 1861, prohibiting the deceiving of prospective land purchasers.

5/ In addition to the scienter element, the Department's bill differs in other ways from the proposal drafted by the Organized Crime Commission. First, the Department's bill covers money laundering that affects commerce whereas the Commission's bill was restricted to money laundering through financial institutions. Second, the Department's bill covers money laundering through wire transfers; the Commission's bill does not. Third, the Commission's bill did not contain a forfeiture provision or civil penalties. Fourth, the Commission's bill provides for general extraterritorial jurisdiction over the offense. The Department's bill provides for much more limited extraterritorial jurisdiction. Such jurisdiction would attach only if the the transaction constituting the offense involved the laundering of $10,000 or more derived from a violation of title

18 or from certain particularly serious offenses in other titles such as those involving drugs, tax evasion, and espionage; the conduct constituting the money laundering was by a United States person, or, if not by a United States person it occurred at least in part in the United States; and the defendant had actual knowledge that the money represented the proceeds of one of the covered types of unlawful activity. The requirement that the defendant have actual knowledge that the money was derived from a crime, as opposed to having acted with reckless disregard of that fact, was added because of a concern that otherwise the new money laundering offense might impose a burden on foreign persons acting abroad to become aware of United States law.

6/ See, for example, Backun v. United States, 112 F. 2d 635, 637 (4th Cir. 1940) where the court stated that "[g]uilt as an accessory depends, not on 'having a stake' in the outcome of crime ... but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them having a stake in the fruits of their enterprise."

7/ To a lesser extent, S. 1385 contains certain procedural changes with the same objective. S. 572 is limited to a new money laundering offense.

8/ The Bank Secrecy Act includes the Currency and Foreign Transactions Reporting Act. The CFTRA was enacted as Title II of P.L. 91-508 and is now codified at 31 U.S.C. 5311-5322. Together with Title I of P.L. 91-508, it is commonly called the Bank Secrecy Act.

9/ The term "initiates" is not defined in the bill but apparently it would not include the situation where a bank willingly engaged in a transaction in obviously "dirty money" as long as the customer suggested or requested the transaction. Somewhat confusingly, S. 1385 defines the term "conducts" as "commencing, concluding, or participating in the commencement or conclusion of a transaction." At first glance, this would seem to include banks in its coverage. Unfortunately, the term "conducts" is not used in that part of S.1385 that states the offense (proposed subsection 1956(a) of title 18), so the definition is useless.

The CHAIRMAN. Mr. Trott, the bill provides for broad application of civil and criminal forfeiture of money, property, and proceeds. For instance, would these provisions authorize the forfeiture of attorneys' fees which may have been paid from such proceeds?

Mr. TROTT. Mr. Chairman, this bill really does not alter the law of forfeiture. And if an attorney were to be in possession of money that under Federal law would be subject to forfeiture, this neither adds nor takes anything away.

It is our view that under no circumstances, should the law of forfeiture contain an exception for drug money or any other criminal money that is transferred to an attorney as fees under circumstances where the attorney knows that this is illegal money.

By the same token, if the attorney is a bona fide purchaser, or the equivalent thereof, and comes honestly into the possession of this type of money, that would not be subject to forfeiture.

In short, it really does not change the law one way or the other. The law that would be applicable would remain the same.

The CHAIRMAN. I am certainly in favor of legislation for this money laundering question. I just wondered, suppose a lawyer represented a man, and he did not know where his client got his money from. I am wondering whether it is wise to try to go back and try to charge the lawyer whatever fee he had received for representing the man.

Mr. TROTT. Well, Mr. Chairman, our position on this is fairly clear. We recently have issued guidelines in the Department of Justice, for which I am responsible, and essentially the guidelines say that forfeiture proceedings shall not be brought against fees that are paid to an attorney unless it can be proved that the attorney took or accepted that money knowing that it was the proceeds of criminal activity. And under those circumstances——

The CHAIRMAN. Yes; in other words, if the attorney knew it came from illegal activities, you could recover it.

Mr TROTT. That is right.

The CHAIRMAN. Well, that would sound reasonable.

Mr. TROTT. And otherwise, as I said, if an attorney is——

The CHAIRMAN. That burden, I guess, would be on the Government to show that, though.

Mr. TROTT. That is absolutely correct. And if the case is that the attorney is essentially a bona fide purchaser, or comes honestly into the possession of this fee money, we are not interested in going after that type of proceeds.

The CHAIRMAN. Would you mind providing us with a set of those guidelines?

Mr. TROTT. Yes, Mr. Chairman; these have recently been promulgated and discussed——

The CHAIRMAN. I guess that same principle would apply to other persons to whom a man who laundered the money spent his money?

Mr. TROTT. That is correct.

The CHAIRMAN. For instance, if you bought an automobile, if the agent knew that it was illegal money, was laundered money, then he could be held responsible, couldn't he?

Mr. TROTT. Oh, yes.

The CHAIRMAN. But they would have to know that, and the Government would have to prove that they knew it.

Mr. TROTT. Essentially, the law of forfeiture protects the innocent person who enters into that type of a transaction with no reason to know that he is receiving criminal money.

The CHAIRMAN. Now, what about obtaining information from banks—just how far can he go along that line?

Mr. TROTT. Well, I think we have the capacity currently under the law to obtain information from banks in a criminal sense by issuing grand jury subpoenas. And what we are doing in this bill is enabling us to get that type of information without letting the targets of our investigations know that we are onto their trail. But this, in a sense, is still basic law enforcement information and, of course, Mr. Queen——

The CHAIRMAN. I think that is most important to be able to get that information, but I think you have got to be careful how you get it. In other words, if I have got a deposit in the bank, I do not think anybody would have the right to just go to the bank for a loan and ask about how much money I have in the bank, where it came from, and so on. But if you can trace this money and show that it came from an illegal source, then the bank should cooperate.

Mr. TROTT. I think Mr. Queen from the Treasury Department can address that issue.

The CHAIRMAN. And I just want to be sure that you study your bill again, if necessary, because there could be serious objection raised along that line, unless the bill is very clear to protect the rights of individuals, and not having someone be able to go to a bank and ask questions about a man's deposits, where he got his money, and how he spent it, unless they have some evidence to show that he did obtain it illegally or something of that sort.

The "reckless disregard" standard of intent is within the administration's bill. Would you explain the limits of this standard, and what standard of care would a jury be instructed to apply?

Mr. TROTT. Mr. Chairman, essentially the "reckless disregard" standard is defined in the new money laundering offense as "an awareness of facts and circumstances that lead the person to believe that a substantial risk exists that the monetary instruments involved in the transaction represent the proceeds of, or derive from, an unlawful activity, coupled with his conscious disregard of the risk."

In other words, this is almost the type of situation that is described as asking no questions and deliberately blinding yourself to facts that would leap out and let any reasonable person know that this is an unlawful activity. This requires essentially a gross deviation from the standard of care that a reasonable person would exercise under the circumstances.

"Reckless disregard" is used in three other statutes and is to be contrasted sharply with a mere "reason to know" or negligence standard which was recommended by the Commission on Organized Crime. After careful consideration, we concluded that a "reason to know" standard was not suitable as being too low for subjecting a person to either the serious criminal or civil sanctions set out in the new money laundering offense. There are standard

instructions in all the books on this subject that describe this type of behavior, which juries are already used to in this country.

The CHAIRMAN. Thank you.

The distinguished Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

First of all, I want to put in a short statement.

The CHAIRMAN. Without objection, that will be done. And Senator Mathias has a statement, and we will let that follow Senator D'Amato's statement.

Senator GRASSLEY. I have just one question of Mr. Trott, and this would be in regard to S. 1335. I would like to have you comment on the charge that the rule 17(c) amendment in the bill, which permits the issuance of gag orders, would prevent a subpoenaed person from discussing the subpoena with his attorney.

Mr. TROTT. Senator, that is an interesting observation. Frankly, it is the first time I have heard it. Of course, the intent of the amendment to 17(c), as I indicated earlier, is to try to protect the integrity of the information from getting to the target of the investigation.

As you know, in the middle of an investigation, if you tip off the people that you are looking for, what you are looking for and where you are and what you are doing, it becomes very unlikely that you will be successful in accomplishing that.

Frankly, I have not thought about whether or not this would prohibit discussing that with one's lawyer. I would think off the top of my head that it would not, and I would think that the courts that would be issuing these types of orders would have enough authority, if confronted with that question, to allow that type of discussion to take place.

It is certainly not the intent of the legislation to prevent discussion with one's lawyer. It is the intent of the legislation only to prevent transmission of information to the target of the investigation.

So what this really does is expand the authority of the court in the appropriate case to make sure that that is a possibility.

Senator GRASSLEY. Then, the extent to which it is not the intent of the legislation, then—I guess I would ask you to look at it further, since you said you have not had a chance to think about it—if your staff and my staff would come to the conclusion that it is not clear, then would you be willing to work something out so it would be more clear?

Mr. TROTT. Yes. We will take a look at that, Senator. That is a good point.

Senator GRASSLEY. Thank you.

Mr. Chairman, I have no further questions.

The CHAIRMAN. Next, we will hear from Mr. David Queen, Acting Assistant for Enforcement and Operations, Department of the Treasury.

You may proceed for 5 minutes, and then we will ask questions.

STATEMENT OF DAVID D. QUEEN

Mr. QUEEN. Thank you, Mr. Chairman.

I appreciate the opportunity to appear before you today on the subject of money laundering and possible legislative responses to it.

Money laundering, as this committee is fully aware, is an indispensable element in every criminal organization. Without a means to convert its illicit earnings into other forms of wealth, organized crime could not maintain the veil of secrecy that allows it to flourish in our society. It could not reinvest its illegal proceeds in ways that allow it to continue and expand its operations, and it could not so readily spread its corrupting influence.

The Department of the Treasury has long been engaged in efforts to attack the financial underpinnings of organized crime, particularly the drug trade. The key weapons in Treasury's arsenal are its Bank Secrecy Enforcement Program, the High-Level Drug Dealers Project, conducted by the IRS, and the various task forces on which IRS and U.S. Customs agents apply their financial investigative techniques to uncover financial transactions related to criminal activity.

In addition to our investigative work, Treasury has directed substantial attention to the regulatory enforcement of the Bank Secrecy Act, particularly the reporting requirements, that is, the requirements that are in place under the act.

The information collected under these reporting requirements is essential for our financial investigations. We have taken steps over the past several years to improve the level of compliance of financial institutions with the reporting requirements, particularly with respect to regulatory changes made in 1980 that increased the effectiveness of the act as a tool to combat money laundering.

Earlier this year, the *Bank of Boston* case brought heightened public attention to the matter of compliance by financial institutions. However, we have been building cases against financial institutions and their employees for noncompliance since the late 1970's. To date, we have brought over 40 such cases. At present, we have approximately 100 active referrals of financial institutions to the IRS for investigation of possible civil and criminal liability.

Additionally, we have strengthened our regulations to include reporting by casinos and to provide for reporting on specified international transactions.

Now I would like to turn to the bills before the committee, Senate bills 572, 1385 and 1335. Senate 1335, the Money Laundering and Related Crimes Act of 1985, was developed jointly by the Departments of Justice and Treasury. I will concentrate on the amendments in these bills that would enhance the Treasury's enforcement of authority under the Bank Secrecy Act. Mr. Trott, of course, has addressed the title 18 violations.

The Bank Secrecy Act is an effective law enforcement tool, but in and of itself is not enough to stop money laundering. As long as the requisite reports of currency transactions are filed under the Bank Secrecy Act, money laundering transactions may now take place without risk of sanctions under the act.

Both of Senator D'Amato's bills have much to commend them, and contain valuable amendments to Treasury's Bank Secrecy Act enforcement authority. Nevertheless, we believe that the more comprehensive amendments to title 31 in S. 1335 are needed at this time.

Also, only S. 1335 among the bills under consideration includes essential amendments to the Right to Financial Privacy Act. These amendments would greatly facilitate efforts to curb money laundering and related criminal activity by allowing financial institutions to fulfill their duty to cooperate with Federal law enforcement activities without fear of civil liability with respect to criminals.

With respect to Treasury's enforcement of the Bank Secrecy Act, the most important provision in all three of the bills before the committee is a provision that would give the Secretary for the first time summons authority both for financial institution witnesses and documents in connection with Bank Secrecy Act violations. This authority was among the legislative recommendations in the October 1984 report of the President's Commission on Organized Crime.

Section 5(c) of S. 1335 strengthens the civil penalty provisions of the Bank Secrecy Act. I will not go into detail, but suffice it to say that there is a substantially increased penalty for willful violations, and the bill also provides for a heretofore nonexistent penalty of up to $10,000 for negligent violations.

Section 3 of S. 1335 sets forth several amendments to the Right to Financial Privacy Act of 1976. These amendments would not compromise any legitimate privacy interest. Several of the amendments are variations of recommendations made by the President's Commission on Organized Crime, which appeared in H.R. 1367. In viewing these amendments, it is important to bear in mind that the Right to Financial Privacy Act does not confer any rights on the part of an aggrieved customer to recover damages from a bank, for that bank's release of information to State law enforcement authorities, private parties, or even to foreign governments.

The only organizations that are involved in this and whose access to the records is proscribed by the act are Federal law enforcement agencies.

It seems my time is up. I will hasten to the nub of the matter on the Privacy Act and emphasize what the Treasury and Justice Departments are recommending and urging through your sponsorship——

The CHAIRMAN. Do you favor this particular bill, or do you think some changes should be made to it?

Mr. QUEEN. The Department of the Treasury and Justice are prepared to support the Money Laundering and Related Crimes Act of 1985 as configured. We are obviously not hostile to any sound——

The CHAIRMAN. I am not asking you if you are hostile. The point is, does this bill protect the rights of citizens as well as assist the Government in obtaining information on this laundering of money. You have got to protect the individual citizen.

Mr. QUEEN. In my judgment, it does, Senator. In my judgment, it does not even remotely infringe on legitimate privacy expectations——

The CHAIRMAN. So you favor the bill as written?

Mr. QUEEN. Yes.

The CHAIRMAN. All right. Go ahead.

Mr. QUEEN. I think I will wrap up at that point, Senator.

[Statement follows:]

STATEMENT OF THE HONORABLE DAVID D. QUEEN
ACTING ASSISTANT SECRETARY (ENFORCEMENT AND OPERATIONS)
U.S. DEPARTMENT OF THE TREASURY

The Treasury View on Legislation to Combat Money Laundering

Mr. Chairman and members of the Committee:

I appreciate the opportunity to appear before you today to discuss the views of the Treasury Department on the problem of money laundering and possible legislative responses to it. In my testimony today, I will present the Treasury Department's views on the various bills before the Committee. First, however, I believe that it would be useful to discuss briefly the problem of money laundering itself and the history of Treasury's efforts to suppress it.

Money laundering, as this Committee is fully aware, is an indispensable element in every criminal organization. Without a means to convert its illicit cash earnings into other forms of wealth, organized crime could not maintain the veil of secrecy that allows it to flourish in our society. It could not reinvest its illegal proceeds in ways that allow it to continue and expand its operations. And it could not so readily spread its corrupting influence.

Because of its unique combination of expertise in financial matters and law enforcement responsibilities, the Department of the Treasury has long been engaged in efforts to attack the financial underpinnings of organized crime, particularly the drug trade. The passage of the Bank Secrecy Act in 1970 gave new impetus to this cause and authorized Treasury to obtain the type of financial reporting that can be useful for law enforcement in ferreting out organized crime and prosecuting its criminal operatives. Another example of Treasury's efforts against the financial base of the criminal underworld is the Narcotics Trafficker's Tax Project, a program that the Treasury Department initiated in 1971 to use Title 26 sanctions against

major drug traffickers, many of whom were identified by DEA as well as by IRS special agents and revenue agents. This program resulted in more than 500 recommendations for prosecution and over $200 million in additional tax liability. IRS conducts a similar program today known as the High Level Drug Leaders project, which also has had considerable success.

Between 1980 and 1983, the High Level Drug Leaders Project opened 2700 cases and produced 594 indictments and 380 convictions. In 1984 Fiscal Year alone, the project opened 1085 cases, produced 516 indictments, and resulted in 353 convictions. The project has expanded since then and has produced 1188 cases, 673 indictments and 515 convictions in Fiscal Year 1985.

Among Federal agencies, Treasury stood virtually alone in the investigation of money laundering throughout the 1960's and 1970's. In the 1980's, heightened concern over the problem of drug trafficking, as well as growing recognition that an attack on money laundering is essential to this struggle, has lead to a multi-agency attack on money laundering. Today, task forces composed of agents from bureaus under the Departments of Justice and Treasury investigate narcotics and other organized crime offenses, with the benefit of the financial investigative techniques that Treasury has developed. These techniques were first used on a large scale in Miami through a Treasury initiative that became successful as a joint venture with the Justice Department known as Operation Greenback.

Greenback sought to investigate the reasons for the $5.8 billion currency surplus reported by the Federal Reserve Bank offices in Florida. Because normal growth in an economic region ordinarily produces a net currency deficit, the surplus in Florida suggested the presence of large amounts of drug proceeds in the local economy.

Encouraged by the success of Greenback, Treasury has since established approximately 40 task forces in cities across the nation, which together with Greenback have produced more than 1300 indictments since 1980, as well as $81.8 million in currency seizures and $34.4 million in properly seizures. Greenback itself is now part of the Organized Crime Drug Enforcement Task Force for the Southeast region. As this Committee is aware, thirteen OCDE Task Forces are now in operation.

The OCDE Task Forces have been an unprecedented success, and Treasury is proud of the role played by its participating bureaus--IRS, U.S. Customs, and the Bureau of Alcohol, Tobacco and Firearms. Although these Task Forces have been fully operational only since July of 1983, they have initiated 1054 cases. They have produced indictments of 6454 individuals, 2695 of which have already been convicted. More than two-thirds of the OCDE Task Force cases have a financial component and many more were dependent on financial investigations for important evidence.

Treasury's investigations have had a significant impact on criminal organizations that launder drug proceeds. Since 1980, we have destroyed eighteen such organizations, which have laundered a total of approximately $2.8 billion. The cases involved are listed below:

Case that have already resulted in convictions	Dollars Laundered	Time Frame
Isaac Kattan	$500,000,000	3 Years
Reno Ghitis	269,000,000	5 Years
Orozco	145,000,000	13 Months
Armenteros, et al.	130,000,000	8 Years
Great American Bank	95,000,000	13 Months
Zapata, et al.	17,000,000	8 Months
Pinto	12,000,000	13 Months
	Subtotal: $1,167,000,000	

Pending Cases

A	$300,000,000	3 Years
B	300,000,000	8 Years
C	250,000,000	20 Months
D	230,000,000	3 Years
E	180,000,000	2 Years
F	140,000,000	8 Months
G	70,000,000	8 Months
H	65,000,000	1 Year
I	60,000,000	1 Year
J	20,000,000	18 Months
K	9,000,000	3 Months
Subtotal:	$1,624,000,000	
Total:	$2,791,000,000	

In addition to our investigative work, Treasury has directed substantial attention to the regulatory enforcement of the Bank Secrecy Act, particularly the reporting requirements that are in place under the Act. The information collected under these reporting requirements is essential for our financial investigations.

Treasury analyzes this information at the Financial Analysis Division, which is located at U.S. Customs headquarters. By combining these data with other sources of intelligence, this Division is able to generate financial intelligence reports, currency flow charts, and link analyses that probe the financial connections inside and among illicit enterprises. The analyses produced there support ongoing financial investigations and can generate leads for new ones. All of the task forces I have mentioned benefit from this Customs analytical capability, as do Federal, State and local law enforcement agencies.

We have taken steps over the past several years to improve the level of compliance of financial institutions with the re-

porting requirements, particularly with respect to the regulatory changes made in 1980 that increased the effectiveness of the Act as a tool to identify and combat money laundering. Earlier this year, the media coverage of Bank of Boston case brought heightened public attention to the matter of compliance by financial institutions. However, we have been bringing cases against financial institutions and their employees for noncompliance since the late 1970's. To date, we have identified approximately 40 cases that have resulted in criminal convictions of banks or bank employees. At present, we have approximately 100 active referrals of financial institutions to IRS for investigation of apparent criminal violations.

As a result of the publicity following the Bank of Boston case, over sixty banks have disclosed Bank Secrecy Act violations, many on a voluntary basis. On June 18, 1985, Treasury announced that civil penalties ranging from $210,000 to $360,000 had been imposed on four of these banks -- Chase Manhattan Bank, Manufacturers Hanover Trust, Irving Trust and Chemical Bank. On August 27, Treasury imposed a civil penalty of $2.25 million against Crocker National Bank based on over 7800 reporting violations. This is the largest Bank Secrecy Act civil penalty imposed by Treasury to date. On October 11, Treasury assessed a civil penalty of $229,750 against the Riggs National Bank. The cases of the other banks that have come forward are currently under review.

Additionally, we have been working with the financial institution regulatory agencies to strengthen their Bank Secrecy Act examination procedures. More rigorous examinations should lead to improved compliance.

We have strengthened the Treasury Bank Secrecy Act regulations in several respects: On May 7 of this year, regulations became effective that designated casinos as financial institutions

subject to certain Bank Secrecy Act reporting and recordkeeping requirements. As evidenced in hearings by the President's Commission on Organized Crime this summer, money laundering through casinos may be even more widespread than once thought. The Treasury regulations will reduce the attractiveness of the use of casinos for money laundering.

Finally, a regulatory amendment pertaining to international transactions was published as a final rule in the Federal Register on July 8 of this year. These regulations do not themselves impose any reporting requirements. Under the regulations, however, Treasury will be able in the future to select a financial institution or a group of financial institutions for reporting of specified international transactions, including wire transfers, for defined periods of time. We envision that this will require reporting of transactions with financial institutions in designated foreign locations that would produce information especially useful in identifying individuals and companies involved in money laundering or tax evasion.

This effort reflects Treasury's intention to make further progress against the problem of international money laundering. Another aspect of our attack on money laundering offshore is our negotiation with foreign governments that have stringent bank secrecy laws. Treasury has worked closely with the Departments of Justice and State to obtain the cooperation of these governments for the release of financial information relevant to possible violations of law. The agreement our government has reached with Great Britain that provides for access by U.S. prosecutors to information located in the Cayman Islands that is relevant to narcotics violations is a direct result of this endeavor.

Now, I would like to turn to the bills before the Committee, Senate bills 571, 572, 1385 and 1335. Senate 1335, the "Money Laundering and Related Crimes Act of 1985," was developed jointly by the Departments of Justice and Treasury.

In my remarks today, I will concentrate on the amendments in these bills that would enhance Treasury's enforcement authority of the Bank Secrecy Act and on the amendments in S. 1335 to the Right to Financial Privacy Act. Mr. Trott will address the provisions in the bills establishing a criminal offense for money laundering. Let me just note that Treasury believes that the need for a money laundering offense is beyond debate. As I have discussed, the Bank Secrecy Act is an effective law enforcement tool, but in and of itself, it is not enough to stop money laundering. As long as the requisite reports of currency transactions are filed under the Bank Secrecy Act, money laundering transactions may now take place without risk of sanction under the Bank Secrecy Act.

Both of Senator D'Amato's bills (S. 571 and S. 572) and Senator DeConcini's bill (S. 1385) have much to commend them and contain valuable amendments to Treasury's Bank Secrecy Act enforcement authority. Nevertheless, Treasury believes that the more comprehensive amendments to Title 31 in S. 1335 are needed at this time.

Also, only S. 1335 among the bills under consideration includes essential amendments to the Right to Financial Privacy Act. These amendments would greatly facilitate efforts to curb money laundering and related criminal activity by allowing financial institutions to fulfill their civil duty to cooperate with federal law enforcement authorities without fear of civil liability to those whom they suspect of criminal activity.

With respect to Treasury's enforcement of the Bank Secrecy Act, the most important provision in all three of the bills before the Committee is the provision that would give the Secretary for the first time summons authority both for financial institution witnesses and documents in connection with Bank Secrecy Act violations. This authority was among the legislative recommendations in the October 1984 report of the

President's Commission on Organized Crime. I would add that long before the PCOC report, Senator D'Amato advanced the idea of this summons authority and introduced legislation to accomplish it in the last Congress.

Under the summons authority in S. 1335, the Secretary would be able to summon a financial institution officer, employee, former officer, former employee, or custodian of records who may have knowledge of a violation of the Act and require production of relevant documents. This authority is essential both to investigate violations and to assess the appropriate level of civil penalties once a violation is discovered.

Section 5(c) of S. 1335 contains amendments to 31 U.S.C. § 5321, to strengthen the civil penalty provisions of the Bank Secrecy Act. Under current law, the civil penalty for willful violations of reporting requirements under the Act is $10,000 per violation, with an additional penalty for the failure to report the international transportation of monetary instruments. S. 1335 provides for a new penalty of not more than the amount of the transaction up to $1,000,000, or $25,000, whichever is greater, for all reporting violations.

For instance, if a financial institution failed to report a transaction of $12,000, the maximum civil penalty that could be imposed would be $25,000. If a financial institution failed to report a transaction of $2 million, the maximum civil penalty that could be imposed would be $1 million. For violations that do not involve the reporting requirements, the maximum penalty would continue to be $10,000. These increased penalties will make clear to financial institutions that proper reporting is extremely important to law enforcement and that the financial consequences of non-compliance could be severe. S. 571 and S. 1385 also would increase the amount of civil penalties for reporting violations; they would do so by establishing a maximum penalty of the amount of the transaction in all cases.

The Administration's bill provides a new penalty for negligent violations of the recordkeeping and reporting requirements. Under current law, civil penalties may be imposed only for willful violations, which encompass violations done with reckless disregard of the law or with specific intent to violate the law. Mere negligent non-filing by banks deprives the Government of important law enforcement information to the same extent as do willful violations. This provision would subject violators to a $10,000 civil penalty in cases where the facts do not support a finding of willfulness.

All three bills would impose a new civil penalty on individuals who fail to report information about foreign bank accounts and foreign bank account transactions under 31 U.S.C. § 5314 and the regulations thereunder.

S. 1335 also amends the civil penalty provision, 31 U.S.C. § 5321, to clarify that criminal penalties under § 5322 and civil penalties under § 5321 are cumulative. This provision makes explicit that if the Secretary of the Treasury assesses a civil penalty in a case and then refers the case to the Department of Justice for criminal prosecution, a court should impose criminal penalties without reference to whether a civil penalty has been imposed (except to the extent that the prior penalty affects the defendant's ability to pay). Similarly, if a criminal conviction occurs before assessment of a civil penalty, the Secretary of the Treasury is free to impose the full measure of civil penalties available.

Subsection 5(d) of S. 1335 establishes a six-year statute of limitations for actions to enforce civil penalties under the Bank Secrecy Act. Bank Secrecy Act civil penalty enforcement actions are now governed by the general five-year statute of limitations for all civil fines and penalties, 28 U.S.C. § 2462. This change is needed because civil penalty cases are frequently subject to related criminal actions which may take many months to

conclude. There may be a stay of civil proceedings pending the criminal proceedings, or a decision to await assessment of a civil penalty until the conclusion of the criminal proceedings. The six-year statute of limitations ordinarily would allow Treasury to retain the right to impose a civil penalty on all the transactions that were within the statute of limitations when the matter was referred for criminal action.

Section 5(b) of S. 1335 revises 31 U.S.C. § 5319 relating to disclosure by the Secretary of the Treasury of information reported under the Bank Secrecy Act. Currently, the Secretary is required to make such information available to a federal agency upon request. The amendment clarifies that the Secretary may also make this information available to a state or local agency and may make disclosure to any federal agency if he has "reason to believe" the information would be useful to a matter within the receiving agency's jurisdiction, with or without a request. Disclosure may also be made to the intelligence community for national security purposes.

Section 5(f) amends the Bank Secrecy Act definition of "monetary instrument" to eliminate any possibility that the current definition could be viewed as a bar to the defining of the term "monetary instrument" by regulation to include, for example, cashier's checks and checks drawn to fictitious payees.

Section 3 of S. 1335 sets forth several amendments to the Right to Financial Privacy Act of 1976 (Title XI of Public Law 95-630) ("RFPA"). Many of these amendments are intended to define the extent to which financial institutions may cooperate in Federal law enforcement efforts without risking civil liability under the RFPA. These amendments would not compromise any legitimate privacy interests. Several of the amendments are variations of recommendations made by the President's Commission on Organized Crime which appear in H.R. 1367.

In viewing these amendments, it is important to bear in mind that the Right to Financial Privacy Act does not confer any rights on the part of an aggrieved customer to recover damages from a bank for that bank's release of information to state law enforcement authorities, to private parties, or even to foreign governments. The Act provides for penalties only in the case of disclosure to the federal government, and the prospect of liability under the Act has had an overly inhibiting effect on the disclosure of information related to criminal activity. Treasury urges that the Congress not continue to allow the Act to be used as a shield to prevent banks from voluntarily making timely disclosure of ongoing criminal activity to federal law enforcement authorities.

Treasury's experience with numerous banks of every size, across the country, shows that banks want to assist federal law enforcement authorities. Bankers often have expressed regret that they must make a business decision to restrict their disclosure of suspicious activity to federal authorities given the risk of civil action under the RFPA by those whom they suspect of criminal activity.

In my view, the most important change the bill would make to the Right to Financial Privacy Act is the amendment to subsection 1103(c), 12 U.S.C. § 3403(c). Currently, § 3403(c) provides that nothing in the Act shall preclude a financial institution form notifying a Government authority that the institution has information which may be relevant to a possible violation of any statute or regulation. The provision has created much confusion among financial institutions regarding how much information relating to the possible violations of law can be given to a Government authority without the risk of civil liability.

For effective enforcement against money laundering, it is critical that financial institutions be free to divulge enough

information about the nature of the possible violation and parties involved so that the Government authority may proceed with a summons, subpoena or search warrant for additional information. Therefore, in order to define the extent of permissible disclosure, subsection 3(c) makes explicit that the information a financial institution may provide to law enforcement, without customer notification, includes the name or names and other identifying information concerning the individuals or account involved, as well as the nature of the suspected illegal activity. This provision would not authorize full disclosure of all information and records in the financial institution's possession.

Another proposed amendment would allow a financial institution to make full disclosure in certain narrowly defined situations. Subsection 1113 of the Right to Financial Privacy Act, 12 U.S.C. § 3413, would be amended to allow a financial institution to provide the Government, without customer notice or fear of civil liability, all information and records which it has reason to believe may be relevant to certain possible crimes -- crimes by or against a financial institution or financial institution supervisory agency, Bank Secrecy Act violations, violations of the proposed money laundering offense, or enumerated drug-related crimes.

The bill provides two additional protections to financial institutions that cooperate in disclosing suspected criminal activity. First, the "good faith" defense that financial institutions may raise in civil actions by customers whose records have been disclosed (12 U.S.C. § 3417(c)) is expanded. Also, the bill adds a new provision that makes it explicit that the Right to Financial Privacy Act preempts any state financial privacy law or court decision that is more restrictive of disclosure to the government of a possible violation of law without customer notice.

The bill also amends 12 U.S.C. § 3412 to eliminate the requirement of certification and notice to the customer when an

agency that has received financial records in accordance with the provisions of the RFPA transfers the records to another agency, as long as the transferring agency believes the records may be relevant to a matter within the jurisdiction of the receiving agency. The eliminated notice of further transfer provides little if any further privacy protection to the affected bank customers.

Treasury opposes a provision in S. 1385 that would provide that every Bank Secrecy Act reporting exemption be approved by the Secretary on a quarterly basis. Currently under the regulations, a bank may exempt from reporting certain cash deposits and withdrawals of accounts of retail businesses in amounts consistent with the lawful, customary conduct of such a business. The bank has a continuing duty to monitor the qualifications for such exemptions. It would be unwise, in our view, to shift away from the bank the burden of monitoring the eligibility of bank customers for exemptions. The bank is in the best position to know its customers and changes in their status. Accordingly, the provision is unnecessary and overly burdensome to the Government and to the financial community.

Other measures can more effectively ensure against inappropriate exemptions. For instance, we are considering instead a regulation that would provide IRS with copies of all exempt list applications, the truthfulness of which would be compelled under the sanction of 18 U.S.C. § 1001. Also, in our work with the financial institution regulatory agencies, we are addressing the matter of review of exemption procedures.

Mr. Chairman, this concludes my prepared remarks. I would be happy to answer any questions from the Committee.

The CHAIRMAN. Mr. Queen, the administration's bill, S. 1335, is the only bill under consideration which amends the Right to Financial Privacy Act. Please elaborate regarding these amendments and whether they are regarded as essential to the enforcement scheme.

Mr. QUEEN. In detail, of course, in my written submission, we go into all of the proposed amendments. I think probably the single most important amendment would be to clarify an already stated purpose of the existing Right to Financial Privacy Act, and that is that the bankers not be unduly restricted from providing to Federal law enforcement authorities legitimate suspicions involving possible criminal activity by customers.

Right now, under the RFPA, that sentiment is expressed, but the banking community has made very clear over the past several years that it is legitimately concerned about civil suits in the event that the bank makes disclosure of suspicious activity to the Federal Government, but it later turns out that in all good faith the bank was nevertheless wrong.

What the bill does is provide the mechanism for a bank to alert us to possible criminal activity, but be protected from unjustified lawsuits so long as the bank acted in good faith based on reasonable suspicion.

The CHAIRMAN. More specifically, under the current Right to Financial Privacy Act, the bank may notify the Government that it has information which may be relevant to a possible violation of the law. Why does the bill amend current provisions to provide the financial records if the bank only has reason to believe in its judgment that they may be relevant to a possible violation?

Mr. QUEEN. The "may be relevant" language which is contained in the existing statute sets an objective standard which could expose the bank, operating in good faith, to civil suits, if in the end facts unbeknownst to the bank proved that it was incorrect in its suspicion. The amended language which we are proposing applies a subjective standard based on information known to the banker at the time he relays the information to us, so long as it is done in good faith.

So, what it really does is protect the bank from an unjustified collateral suit.

The CHAIRMAN. Those are all the questions I have.

The distinguished Senator from Delaware.

This is Mr. Trott, the Assistant Attorney General, and Mr. Queen, from Department of the Treasury.

Senator BIDEN. Thank you, Mr. Chairman.

Mr. Queen, I have a question to you, if I may—and I would like to ask unanimous consent, Mr. Chairman, that my opening statement be put in the record as if read.

The CHAIRMAN. Without objection.

Senator BIDEN. Thank you.

Mr. Queen, the General Accounting Office testified before the Senate Subcommittee on Permanent Investigations chaired by Senator Roth, on the Treasury Department's failure to effectively enforce the provisions of the Bank Secrecy Act. And I understand GAO was asked by Senator Roth to conduct this review based on some disturbing findings that came out of the hearing on the *Bank of Boston* case last spring.

The testimony at that hearing prompted Senator Roth to conclude, and I quote: "It seems to me neither the private sector nor the regulatory agency have given high enough priority to title 31," which is the Bank Secrecy Act.

The GAO review concludes with these findings. The Treasury agency as a group,

> Gave relatively low priority to Bank Secrecy Act compliance when applying examination resources, being concerned primarily with other mission-related objectives; lacked detailed procedures, or applied existing procedures inconsistently; failed to adequately document the work performed, so that often neither we nor they could ascertain how well examiners were performing the compliance examinations, and failed to designate examiners with a wide range of experience and training to assure compliance with the Act, and could better communicate and coordinate with one another and thereby enhance the overall compliance.

Other than those complaints, they were satisfied.

What is your response to this GAO report, and don't these findings point to the need for improvement in your efforts to enforce current law before recommending major revisions?

Mr. QUEEN. Senator, the underlying problem with the regulatory agencies' enforcement of the Bank Secrecy Act is probably not in dispute. The Department of the Treasury did not disagree in hearings last spring that there were shortcomings in regulatory agencies' audit procedures insofar as the Bank Secrecy Act is concerned.

Part of that is inherent in the fact that the audit agencies are fundamentally and primarily there to assure financial stability of the institution. That is not to say they do not have secondary or tertiary obligations.

I would submit that while we have made numerous improvements in the last couple of years in the methodological approach of the regulatory agencies out in the field, that the GAO report is on the contrary powerful evidence. Summons authority contained in the money laundering proposal of 1985 submitted by Senator Thurmond is absolutely vital. The reason for that is fairly simple. Built upon the fact that the OCC, the Fed, and others are conducting financial soundness investigations as their primary function, and they are not trained criminal investigators, the summons authority which we seek but do not now have would authorize the main Treasury Department or agents of the IRS, acting as extensions of main Treasury, to summon records directly relevant not only to possible criminal activity in which the bank is not involved, but also for the purpose of ascertaining the degree and quality of compliance by the bank irrespective of the activity of its individual customers.

So I do not think what we are doing is asking the Senate to overlook shortcomings in the past, but to recognize that the tools that are currently provided to us cannot do as good a job as they could under this proposal.

Senator BIDEN. My point in raising this is not dissimilar to having raised the point actually 4 years before Mr. Trott had his present job at the Justice Department. The Carter administration was absolutely sick and tired of hearing me talk about RICO because in fact, we had it on the books for a long time and it was not until we kept pressing that we found out they did not know how to

use it; that U.S. attorneys were not trained; that we in fact had let this tool essentially lie dormant, by and large.

And so I ask it in the same spirit. That is not to suggest—I went on to introduce significant amendments to the RICO statute, with the concurrence of and cooperation, as did the Justice Department, and we worked out, I think, a pretty good piece of legislation.

My concern, sir, is I am reluctant to give you any new powers before you have learned how to use the ones you have. And I would like to know for the record what are those improvements you referred to in the methodology of applying the present Bank Secrecy Act, Mr. Queen? Can you cite them for me, what improvements you have made?

Mr. QUEEN. I can cite them in a general sense. In the wake of disclosures that numerous officials—I should say examiners—inside the OCC were not, for example, given an adequate checklist to assure that they were looking for Bank Secrecy Act violations——

Senator BIDEN. Has that been done now?

Mr. QUEEN. That has been corrected.

Senator BIDEN. Is there a physical checklist?

Mr. QUEEN. Yes.

Senator BIDEN. Could you make that available for the record for us?

Mr. QUEEN. Actually, the Comptroller of the Currency has it, but I will see to it that you get it.

The other regulation that has been taken care of in the field is to streamline the method of notification to the Department of the Treasury of possible violations.

One of the problems in the past was that there was—and in all honesty, it was an error of Treasury's as much as anyone else—a willingness to delegate to the examiner in the field, in the first and sometimes final instance, the opportunity to decide whether or not a violation or a failure of a bank to maintain an adequate program was willful within the meaning of the act, and should thus be referred to main Treasury for civil penalties and thence on to the Department of Justice for possible criminal penalties.

We have issued directives to the Comptroller of the Currency which require them to provide us with notification of any failures by banks in the field to maintain adequate procedures and not to make the decision in the field that the violation is or is not willful, because what happened in the past was an examiner, operating in good faith but perhaps inadequately trained in the area, making an erroneous conclusion that the failure of a bank to have a particular system did not warrant referral to main Treasury.

Senator BIDEN. Are you aware of any new programs for training bank examiners that, in fact, encompass—beyond a checklist—is there any specific training?

Mr. QUEEN. Starting in the spring of this year, we formed, for want of a better term, an ad hoc Treasury enforcement committee to systematize the various methods of examination in the field, because as you are aware, Senator, we do not deal with just one category of financial institutions. We have to deal with the Comptroller, the Fed, and the like. We discovered that the Fed, the OCC and others were using different methods of examination.

We have through main Treasury established a mechanism to assure that the examiners in the field all apply the same standard--a substantial improvement over the past system, which left it to the various examining agencies.

Senator BIDEN. Correct me if I am wrong, but I am told there are up to seven different agencies within Treasury that are responsible for enforcing the Bank Secrecy Act. Is that correct?

Mr. QUEEN. It depends how you define the term "enforcement." Of course, we also have some that are not directly under our control, the Securities and Exchange Commission, and the like. Of course, we have Customs and IRS, which are directly responsible for criminal enforcement, and actively participate along with Justice in doing that. We also have the various regulatory agencies, and I am not able, off the top of my head, to count the number, but that number is probably not too far off.

Senator BIDEN. Now, as I understand it also, back in May of this year, Secretary Baker was quoted as saying he was "stepping up the Department's effort against money laundering," and he announced the creation of a new Office of Financial Investigations. Can you tell me what this office does, and what it is doing now?

Mr. QUEEN. What it does pales in comparison to what we can do if we get summons authority. Currently, what we do is review reports of possible violations referred to us by the various regulatory agencies. We are also currently, in-house, at main Treasury examining about 100 probable violations of the Bank Secrecy Act by banks.

Senator BIDEN. Now, those probable violations are violations reported to main Treasury from where?

Mr. QUEEN. They come from more than one source. Some of the violations are admissions brought to our attention by the banks themselves upon discovery that they have failed in some particular mechanism to enforce the act.

Others have been brought to our attention by the Comptroller and the Fed. Some are brought to our attention through already existing investigations being conducted by the IRS, Customs, or even Justice components that either began as a civil investigation elsewhere, or began as a criminal investigation, because Senator, as you are aware, of course, we have absolutely no criminal enforcement authority within main Treasury other than through IRS, which authority actually requires the Justice Department to make the final enforcement decision.

Senator BIDEN. Has Justice been cooperating with you?

Mr. QUEEN. Very much so—and vice versa.

Mr. TROTT. I would agree.

Senator BIDEN. Right on cue, Mr. Trott. That is good.

Tell me, assuming you have, Mr. Secretary, this subpoena authority and this new Office of Financial Investigations, how do you intend to coordinate and then later analyze this additional data you will get? Who will make the judgment what to subpoena, and can that only be made if you have that authority at the level of this new Office of Financial Investigations?

Mr. QUEEN. Well, the statute calls for the authority to vest in the Secretary, with the authority, of course, to delegate it, and presum-

ably, it would be delegated to the authority of the Assistant Secretary for Enforcement.

Obviously, the actual physical analysis of the records would take place either within main Treasury, or be turned over to agents of the Internal Revenue Service or Customs who are, of course, agencies of the Treasury Department, and who obviously are capable both in terms of numbers and in terms of experience, to analyze these records.

Senator BIDEN. I notice some of you in the audience are pulling your coats close to your chest because you are so cold. That is one of the problems with having such a healthy Chairman. If Senator Thurmond were not so robust and healthy, we would all be warm, but there is nothing I can do about it; he is too damn strong. I am cold, too. [Laughter.]

How many people have been assigned to this new financial investigations unit, if you know, Secretary Queen?

Mr. QUEEN. Well, depending on how you configure it, we currently have physically housed inside main Treasury four individuals who oversee the operation of financial enforcement under Bank Secrecy. We have, however, several hundred individuals assigned to Customs and IRS.

Senator BIDEN. I understand that, but I am trying to get a fix on what this new outfit is. I mean, is it a cosmetic thing the Secretary is talking about, or is it actually a unit that has a chief and has staff working for it and has guidelines, and so on. I mean, that is what I am trying to get a picture of. Maybe you could help me in that.

Mr. QUEEN. Well, we have, for want of a better term, the chief of the unit, an individual who was present literally at the birth of the Bank Secrecy Act when it came into being in the 1970's. He oversees two other individuals, highly experienced in that field, including an individual that we had detailed over from Customs and now permanently is with us, whose expertise is in computer analysis and the like.

I do not want to mislead the Senator to believe that it was ever the intention of the Treasury to create an enormous enforcement arm within Treasury. That would probably be both futile and wasteful, and would be worse than cosmetic.

Our job is to see to it that investigations of a civil nature are properly carried out both within and without Treasury. And an enormous amount of the work is done outside of main Treasury—has been and always will be. But I can assure you there is nothing cosmetic about it. The individuals in question report to me, and the work that they are performing is both substantial and useful—not to say we could not always use more of it.

Senator BIDEN. Well, what priority within Treasury will money laundering have; what does it have now, and what will it have with this new legislation, assuming we were to pass it? And quite frankly, I support some form of a new money laundering statute. There are several bills, the administration's, Senator D'Amato's, and Senator DeConcini's, which I am slightly more sympathetic to because I think it does not go into areas that we need not go into at this point. But having said that, assuming we get new legislation in this area with additional powers, which I believe we will, and should,

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what will be the priority within Treasury then, or is it mainly something that happens on Justice's watch?

I get a sense that Treasury, understandably and historically, is reluctant to become the main player; they do not have the statutory authority, in many cases, to do that. But it reminds me a little bit of Mr. Trott and I trying to get the State Department to get involved in drug trafficking. They like to carry treaties in their briefcases and not drug enforcement policies, and you folks at Treasury do not picture yourselves as folks, in my view, in main Treasury, who would be out there policing and enforcing money laundering statutes. But maybe I am wrong. Maybe you can tell me where in the scheme of things you think money laundering is and will be in Treasury, main Treasury.

Mr. QUEEN. You are wrong.

Senator BIDEN. Good. Tell me how. What priority does it have, and what will you do with this new legislation?

Mr. QUEEN. We will continue to provide the kind of attention and emphasis to financial violations, especially as they relate to narcotics trafficking, that we have provided in the past.

Senator BIDEN. But don't you understand we feel you have not provided enough attention; so if you provide the same kind, we are going to be real worried.

Mr. QUEEN. Senator, throughout the 1970's, we labored alone in the area of financial enforcement——

Senator BIDEN. I understand that.

Mr. QUEEN [continuing]. And made literally hundreds of important cases. Since the creation of "Greenback," which was a Treasury initiative, and which has been parlayed into some extremely effective OCDE task forces——

Senator BIDEN. I am very bad with acronyms. Please do not use acronyms with me literally, they do not compute. Tell me what you mean.

Mr. QUEEN. Organized Crime Drug Enforcement Task Force.

Senator BIDEN. Good.

Mr. QUEEN. The Department of the Treasury, through IRS, Customs, and the Bureau of Alcohol, Tobacco and Firearms, plays—and I do not think that this is hyperbole—an absolutely crucial role in the investigation and conviction of some of the most significant narcotics traffickers in the country.

We have in the enforcement and operations section, which is the only section I can speak for, an enormous role to play in the very symbiotic issues of narcotics and money laundering, although money laundering, of course, is not restricted to narcotics. Through our oversight of the Customs Service, with its significant and very important role in narcotics interdiction, and through our involvement in the Bank Secrecy Act, we have I think within the limits that the law has provided for us, done an enormous amount to increase the effectiveness of the compliance program in the field.

We have, for example, every year since the 1980 amendments to the Bank Secrecy Act, literally doubled the number of currency transaction reports that we are processing.

Senator BIDEN. Why don't you tell me what that number is?

Mr. QUEEN. We estimate that at the close of this year, it will be 1.5 million individual forms. And that is just currency transaction

reports. Last year, it was 700,000; the year before that, it was under 500,000, the year before that it was a quarter of a million.

Senator BIDEN. Do you have any backlog?

Mr. QUEEN. Yes, we do.

Senator BIDEN. How big is the backlog?

Mr. QUEEN. Currently, it is a little in excess of 400,000 forms, I believe.

The reason for that is that the literal doubling in the last year was somewhat unexpected. It was somewhat fortuitous in one way and damaging in the other. We had a long, planned transfer of our data processing center from Ogden, UT to Detroit, MI, which literally took place in the midst of this enormous influx of forms. So we are probably——

Senator BIDEN. You had no backlog in 1981, 1982, and 1983?

Mr. QUEEN. Well, there is always a backlog. There is probably a turnaround time—the optimum turnaround time would be between 15 and 30 days. Much better than that we are just not ever going to be able to do. But that is really not, I do not think, an impediment to effective law enforcement since most of the CTR's that we deal with——

Senator BIDEN. What are CTR's?

Mr. QUEEN [continuing]. I am sorry, Currency Transaction Reports, the 1.5 million reports—those are really a paper trail that allow us to reconstruct activities. So that 15- to 30-day lag is really not prohibitive. But obviously, the backlog we have now is not acceptable to us, either.

Senator BIDEN. What is the expected workload increase in terms of investigative hours, document review and so on, that you would anticipate under the new powers that you would be granted with this legislation? Have you given that an estimate? Have you calculated that at all?

Mr. QUEEN. Well, it has been given considerable thought by us internally, and we have reached the not surprising conclusion that it is almost impossible to calculate.

Senator BIDEN. Is there any doubt that it would be a significant increase if you were able to do the job—an increase?

Mr. QUEEN. An increase, clearly.

Senator BIDEN. Do you need more personnel?

Mr. QUEEN. Well, in the first instance, we need access to better-quality records, because——

Senator BIDEN. I understand that.

Mr. QUEEN [continuing]. Right now, the cases we are reviewing—I can give you an example——

Senator BIDEN. Well, we can get to that, but tell me whether or not you believe you will need additional personnel to do the job that will be expected of you under the new legislation.

Mr. QUEEN. Assuming no one from OMB is here, I would say that probably the number of additional personnel is almost endless, because noncompliance is a substantial problem and will probably remain so in the years to come.

And of course, the civil enforcement——

Senator BIDEN. Is it fair to say that if we gave you this additional authority and did not give you additional resources, you would

have difficulty in meeting the "reasonable expectations" of the Congress as to what we expect you to do?

Mr. QUEEN. It is hard to know, and there are probably 535 expectations out there. I can say that if you did not give us one additional individual, the summons enforcement would be an immense benefit to us. We would obviously use it with more circumspection than we would if we had a larger staff. I mean, that is a foregone conclusion.

Senator BIDEN. I think you should have that authority, that summons authority, but I want to make sure that we do at the front end what I believe we often forget to do, whether it was on the drug enforcement legislation or forfeiture, which is to provide these new and I think effective weapons without the resources to carry it out. To make it worse, we then have the heads of each of the agencies coming up here year after year and telling us, "By the way, we do not need any money. As a matter of fact, we can even cut money."

Mr. Queen, would you like to comment on the adequacy of the Customs Service, in terms of availability of personnel?

Mr. QUEEN. In the general sense?

Senator BIDEN. In the general sense—adequacy in terms of numbers.

Mr. QUEEN. We are going beyond that, the proposed legislation——

Senator BIDEN. We are going beyond it, but it is an area that is—but is it not in fact, as you have made a very cogent argument here, that in fact, Treasury is important and tough, and one of the two most important arms of Treasury in this area is Customs. So obviously, you have an opinion of whether or not you have sufficient Customs personnel and sufficient Customs budget to be able to do the job.

Mr. QUEEN. As currently configured insofar as the bank secrecy and the financial operations are concerned, I do not think we are in bad shape.

Senator BIDEN. Why?

Mr. QUEEN. I think so because I think we are processing at the Customs Computer Center in Franconia, which analyzes the data provided by the IRS—the IRS actually enters it on tapes, and then it is analyzed by the Customs personnel, who identify potential targets.

I do not think we are badly strapped in that respect, based on the current rate of incoming data. Obviously, if level of compliance dramatically increases, my optimism may not be well-founded.

Senator BIDEN. I will yield to the chairman, but isn't it in fact that it is clear that it will dramatically increase? I mean, how can it not dramatically increase? You have got a bunch of bankers out there, and they are all sitting out there—I assume; I see some $500 suits, so there must be some bankers out there—or lobbyists, or former Senators—but seriously, these folks are going to be in a position with this new legislation where they are going to produce even more information, more of a paper trail, just simply more work.

Mr. QUEEN. Well, I will be intrigued to hear their answer, because if the banks are prepared to tell you that the degree of com-

pliance with the Bank Secrecy Act is entirely dependent upon how much their civil penalty is, that is another way of saying that they did not give a damn in years gone by because the penalty was small.

Senator BIDEN. Well, in fairness to the banks and everyone else, isn't that human nature? I mean, you know, you all do not comply very much until we ask you—that is, "you," the Treasury Department—and then, when we insist, you in fact produce information, but it is very seldom just automatically forthcoming—not just this administration, any administration. And it would be unfair for me to suggest that the Treasury Department, the Justice Department or the Defense Department was not interested in complying with the legislative mandates of the U.S. Congress. The fact of the matter is people tend to do that which they think they have to do.

Mr. QUEEN. You have made a cogent argument for the enhanced penalty aspect of S. 1335 which, as you are aware, carries a very severe smack in the head for any bank that does not comply with the act.

Obviously, in a way, I am trying to play both sides of the argument——

Senator BIDEN. You are entitled to.

Mr. QUEEN [continuing]. Because we recognize that there is in fact a deterrent impact by enhancing the penalty. Too small a penalty, and there is simply no incentive for the bank to comply.

Senator BIDEN. I could not agree with you more.

Mr. QUEEN. That begs the question, and the question on the floor is are we going to get an increase in compliance, and hence, an increase in volume. I think the answer is obviously yes. I hope it is yes.

The difficulty is we began many months ago, Senator, to try to analyze what my predecessor referred to as "defining the universe"—that is, how many CTR's should be filed in a given year, and then compare that against those that are being filed. In other words, how good is the compliance? And we have discovered through very, very careful discussions and scrutiny with the whole range of financial operations that we simply cannot construct a good definition of the universe; we do not know what the level of compliance should be.

Consequently, it is virtually impossible for me to come here and say to you that I anticipate a 35-percent increase in the number of transactions being reported to us which would translate into an *x* percentage——

Senator BIDEN. Well, I am not trying to do that now, and I think until Pat Robertson is President, none of us will be able to define the universe well. [Laughter.]

I do not expect that to occur. But what I do expect is—quite frankly, I plan on supporting stronger legislation in this area. But I want to make it clear that I for one will not be very sympathetic to you and/or the Justice Department if, in fact, after giving this additional power, then in fact it lies dormant or it is not fully utilized because of lack of the application of resources.

I just want to make sure that after we give you the power, whatever the parameters of that power are, that I hope you will also be candid enough to come up here and tell us, notwithstanding what

OMB—you said you hope OMB is not here—OMB is everywhere, and I hope you will answer questions forthrightly for us and not engage in obfuscation, which in fact is sometimes the case when it comes around to budget time. I understand the dilemma you are in, and I am just trying to put you in it preemptively, so that you will then be able to say to OMB, "I cannot go and lie to them now. They had me on record before the act." Or, not "lie," but not respond to them.

Let me conclude, Mr. Secretary, by saying that I think the penalties in fact are too small. I think you are absolutely right that the nature of the penalty has, at a minimum, a chilling effect upon operations that are illegal. And I would just recommend that you spend a lot of time talking to Mr. Trott on the way back downtown, and talk to him about Rockwell and other cases that I am going to want to talk about in another context.

I read in this morning's paper that Rockwell, another defense contractor—we have decided to go after the corporation and not individuals again. Is that correct?

Mr. TROTT. Senator, every word of Andy Pastor's article in the Wall Street Journal relating to the decisionmaking process in the Justice Department is dead wrong.

Senator BIDEN. Good to hear it.

Mr. TROTT. He called me before he wrote that article. I told him we do not discuss our investigations before they occur. He said, "Well, I do not want to make a mistake."

And I asked him, I said, "Well, then, please wait until after the fact so that you can discuss the facts of the case."

His description of the way that case was decided is dead, flat wrong, and I am embarrassed for the Wall Street Journal.

Senator BIDEN. Good. I am glad to hear that because if it were right, I would be embarrassed for the Justice Department, and I am glad to hear it is not right. I am not being facetious. I am serious.

Mr. TROTT. I have described the decisionmaking process, and when the case becomes public, and you are able to see what it is, then I would be delighted to discuss with you why——

Senator BIDEN. And I am not asking you to discuss it, now. That is sufficient for me, and guarantee you you will have an opportunity to discuss it with us.

I have no further questions.

I guess the chairman has no further questions of this panel. (Conferring with staff.) He does not, and he has turned it over to me. OK.

Thank you very much, gentlemen.

Senator BIDEN [presiding]. Our next witness will be James Harmon, Jr., executive director and chief counsel of the President's Commission on Organized Crime.

Good morning. I understand the chairman has set the groundrules of this hearing, which is that witnesses be limited to a 5-minute presentation, and we would appreciate it if you would be willing to attempt to do that, and we will include your entire statement for the record if it goes beyond that.

Thank you, and welcome.

STATEMENT OF JAMES D. HARMON, JR., EXECUTIVE DIRECTOR AND CHIEF COUNSEL, PRESIDENT'S COMMISSION ON ORGANIZED CRIME

Mr. HARMON. I appreciate that, Senator.

On behalf of the President's Commission, I would like to express the Commission's appreciation for the attention which this committee and which you in particular have given to this important issue. Judge Kaufman, the Chairman of the Commission, is occupied today with matters before the court of appeals in New York, but he wanted me to reaffirm for you the Commission's view that its work is done in partnership with the Congress. In that spirit, the Commission is pleased to assist in your analysis of this very important issue today.

A successful strategy to combat money laundering will strike directly at the economic base of organized crime.

Legislation pending before the Congress will do nothing less than attack the profit motive of organized crime, the sole reason for its existence.

For that reason, to handle and address the obvious question of how to get at the mob's money, the President's Commission turned to the issue of money laundering.

Perhaps keeping in mind an interview which we have heard recounted from time to time of a famous bank robber named Willie Sutton, who was asked once: "Why is it, Willie, that you rob banks?"

Willie's response was, "Well, because that is where the money is."

Today, organized crime puts its money in banks and puts its money in financial institutions, which may say something about the differences in organized crime today as it has changed over the years.

Because of the overriding importance of this issue, and because it is something within the control of the United States, the President's Commission turned its interest to this particular subject.

Money earned in narcotics trafficking is earned on the streets and in the towns and counties across the United States. That money at the same time presents a problem for organized crime, but not the same kind of problem for the Government that crop eradication presents in other countries, that crop substitution presents in other countries, or that the use of the military presents in the interdiction of narcotics. Money always, sooner or later, especially when it comes from narcotics trafficking, passes through financial institutions. While crops may move from place to place, while laboratories may move from place to place, the banks always remain where they are located.

So, in making this analysis, Senator Biden, the Commission decided to take a look at the way it looked through the eyes of bankers. So we went inside of banks where there had been documented money laundering cases, and we tried to see it through the eyes of financial institutions. What did it look like to the branch managers? What did it look like to the account managers? What did it look like to the tellers? Did they really know enough to be able to

do something? Did the private sector really have enough expertise to play a role in this effort?

The conclusions now reflected in the Commission's report to the President and to the Attorney General was that the point of attack with regard to money laundering should be at the moment at which the money enters the international financial system—the moment at which cash is given to a teller or given to an account manager. And what we found at that point of attack was that, strangely enough, money laundering itself was not a crime. And we also found at a very key point in the process that banks were prohibited by law from advising law enforcement of suspect transactions. And for that reason, the Commission took the view that banks, like other citizens, should be given the opportunity, should be permitted to report suspected criminal conduct, and that there should be no exception made merely because that criminal conduct took place within the front door of a bank.

We think as a result of our analysis and because of the overriding nature of this problem, that a standard, "reason to know," or in the formulation of the administration bill, "reckless disregard," is a fair enough standard, especially in the case of financial institutions, considering their expertise and considering the expertise of the money launderer.

The idea of legislation designed to get at the heart of the problem, that is, the money laundering process itself, is to permit law enforcement to investigate from the other side of the teller's window, so to speak, to intercept the money launderers, and the money, and the cash, and the profits, before they enter the bank; to limit the need for Internal Revenue agents, FBI agents, to actually conduct their investigations within the banks themselves. And we think also the banks' I think now documented abysmal record of ignoring the reporting requirements of the Bank Secrecy Act, a law on the books for some 14 years, showed the Commission that we simply could not count on banks, on their own, to play a role which they should have been playing for some time.

Finally, Senator Biden, I would like to raise one issue that has surfaced, probably not as a result of our analysis but since our analysis, and that is the question of financial stability of financial institutions.

There now is a clear track record that money laundering, once detected, creates a risk to the financial stability of financial institutions themselves. In our view, before these kinds of investigations became public, the bottom line was the only measure, the only standard by which bankers judged their performance as well as that of their employees.

With that observation in mind, Senator Biden and Senator Thurmond, I would be pleased to answer your questions. I understand that subsequent witnesses will address problems that may be presented by attorneys who are presented with cash fees from their clients. I would be prepared to answer questions on that subject or any others.

[Statement follows:]

Statement

of

JAMES D. HARMON, JR.

EXECUTIVE DIRECTOR AND CHIEF COUNSEL
PRESIDENT'S COMMISSION ON ORGANIZED CRIME

Mr. Chairman and Members of the Committee:

As Executive Director of the President's Commission on Organized Crime, I appreciate the opportunity to testify concerning the various money laundering-related bills now under consideration in this Committee. Since its establishment in July, 1983, the Commission's responsibilities for analyzing organized crime and for defining the uses to which organized crime puts its income have prompted it to devote substantial attention to the problem of money laundering. Although Assistant Attorney General Trott is thoroughly familiar with the challenges that money laundering has created for his department, I want to convey to you some of the concerns that impelled the Commission to devote such attention to money laundering, and to make a number of legislative recommendations in its first interim report, The Cash Connection, that are substantially reflected in the bills now under consideration. In doing so, I also hope to dispel some of the misconceptions that have arisen concerning the need for various provisions in these bills.

Money Laundering as a Criminal Offense

The first topic that I want to address is the need for new legislation to make money laundering a Federal criminal offense. As early as 1970, Congress recognized, in passing the Bank Secrecy Act, that organized crime had substantially increased its use of both domestic and foreign financial institutions in furthering activities to evade investigation by law enforcement agencies. Since then, the Bank Secrecy Act has become

increasingly useful to Federal law enforcement agencies in detecting the operations of money launderers and the organized criminal groups who retain their service.

The fact remains, however, that the Bank Secrecy Act does not strike directly at the activities in which money launderers engage: the concealment of the existence, illegal source, or illegal application of income, and the disguising of that income to make it appear legitimate. By its terms, the Bank Secrecy Act imposes civil and criminal penalties only for violations of the Act's reporting and recordkeeping requirements. As a result, a money launderer who complies with the Act's requirements by filing the appropriate forms (as money launderers have frequently done in the past), or who uses other laundering techniques that do not involve financial institutions covered by the Act, may be able to operate for long periods of time with virtual impunity.

In the absence of any Federal statute that directly proscribes money laundering, organized criminal groups since 1970 have become far more sophisticated in devising money laundering schemes, and more willing to conceal vast amounts of their profits through the use of such schemes. In recent years, money laundering specialists have become accustomed to handling criminal proceeds in amounts that almost defy belief. From 1978 to 1982, for example, a money laundering organization headed by Eduardo Orozco -- which the Commission discussed at length in its interim report -- laundered more than $150 million on behalf of narcotics traffickers. United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir.), cert. denied, 105 S. Ct. 154, 155 (1984). More recently, a money laundering group headed by Ramon Milian-Rodriguez laundered approximately $146 million during a period of only nine months, by physically transporting United States currency from the United States to Panama. At the time of his arrest in 1983, Milian was about to fly his Lear Jet to Panama with a cargo that included more than $5.4 million in

United States currency. United States v. Milian-Rodriquez, 759 F.2d 1558 (11th Cir. 1985). Still another major money launderer, Beno Ghitis, headed an organization that, during a period of only eight months in 1981, laundered more than $242 million on behalf of narcotics traffickers. United States v. Four Million, Two Hundred Fifty-Five Thousand, 37 Crim. L. Rep. 2240 (11th Cir. 1985). Reports such as these, as well as information in the possession of the Commission and law enforcement agencies, indicate that the total amount of money laundered annually from narcotics, illegal gambling, and other illegal activities can be estimated in tens of billions of dollars.

Another significant trend in money laundering is the increasing willingness of some organized criminal groups to tolerate losses of a substantial percentage of their proceeds, where such losses may aid in concealing the illegal source of those proceeds or the conduct of laundering activities. Two significant examples of this trend were disclosed in public testimony at the Commission's hearings in June of this year on gambling and organized crime:

-- A powerful Cuban organized crime group known as "The Corporation" has amassed several hundred million dollars in assets, primarily from its control of illegal "policy" betting operations in various cities throughout the United States. To aid its members in developing ostensibly legitimate sources of income, The Corporation has devised a scheme involving the legal lottery operated by the Commonwealth of Puerto Rico. Partly through its control of the lottery's ticket sales in the United States, The Corporation can quickly determine when certain persons have purchased winning tickets of substantial value (for example, a prize of $125,000). Representatives of The Corporation then approach the holder of the winning ticket, explain that

the prize will be substantially diminished by the payment of Federal income taxes, and offer to purchase the winning ticket (in cash) for an amount in excess of the face value (for example, $150,000 for the $125,000 ticket). A member of The Corporation can then cash in the ticket and claim his "winnings" as legitimately earned income.

-- In a case now under Federal indictment in the Eastern District of New York, more than $3 million in cash from heroin sales was deposited in the cashier's cages at four Atlantic City casinos. At one of the casinos, the Golden Nugget, one Anthony Castelbuono made an initial deposit of $1,187,450 in small bills. According to estimates based on statistics from the Bureau of Engraving and Printing, such a deposit would have a volume of approximately 5.75 cubic feet and would weigh approximately 280 pounds. After losing more than $300,000 in chips, and transferring chips among themselves, Castelbuono and a few associates withdrew $800,000 in $100 bills. Such a withdrawal would have a volume of only 1/3 of a cubic foot and would weigh only 16 pounds. Thereafter, Castelbuono and his associates made additional deposits at the Golden Nugget and continued to gamble there. Eventually, Castelbuono withdrew $983,000 in $100 bills and left the Golden Nugget. Several days later, one of Castelbuono's associates deposited approximately $1 million in an account at the Credit Suisse in Switzerland.

The two cases that I have just described are also significant because they reflect another trend in money laundering: the increasing use of techniques that do not require the direct involvement of financial institutions. Law enforcement authorities, of course, have observed for some time

that narcotics traffickers in various sections of the country have frequently sought to dispose of currency by purchasing expensive automobiles, real estate, and even retail businesses in cash. (One narcotics trafficker in New York City, Freddie Myers, literally tried to launder some of his narcotics proceeds by purchasing a laundromat.)

Some organized criminal groups have shown greater ingenuity in concealing funds. In one recent case, the Robert Govern marijuana organization, located in Florida, laundered some of its proceeds not only by channeling money through an offshore corporation into a lumber business and an apartment complex, but also conducted numerous off-the-books and under-the-table transactions with the subcontractors who were involved in the construction of that apartment complex. United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), cert. denied, 105 S. Ct. 957 (1985). In another case, a distributor for the Mario Adamo cocaine organization in Ohio traveled into Canada, where he purchased 2,600 leather coats for cash, and brought the coats back across the border to Columbus, Ohio. Upon his return to Columbus, the distributor and several associates rented a store and a warehouse for thirty days and sold the coats at a price lower than that charged in legitimate retail stores in the Columbus area. The evidence indicated that the distributor undertook this scheme to provide himself with a seemingly legitimate source for the large amounts of money that he was spending while "unemployed." United States v. Adamo, 742 F.2d 927 (6th Cir. 1984), cert. denied, 105 S. Ct. 971 (1985).

Each of these trends -- the increasing magnitude, complexity, and diversity of money laundering schemes -- indicates that money laundering has become indispensable for the success and profitability of large-scale organized criminal ventures. If law enforcement authorities can strike directly at

the conduits that enable organized crime to conceal its investments or disbursements of funds, they may be able to discourage organized criminal groups from abusing legitimate financial and commercial institutions, and ultimately to cause irreparable damage to the operations of organized crime.

In drafting its proposed statute to make money laundering a Federal crime, however, the Commission recognized that while all participants in a money laundering scheme might be deemed equally responsible for its success, some participants will be more knowledgeable than others about the illegal activities which generate the funds to be laundered. Those responsible for planning, organizing, and overseeing the scheme, for example, are more likely to be privy to information concerning the scope and extent of their clients' illegal activities. Such information would clearly indicate to any money launderer that his intent to carry out the laundering scheme successfully also constitutes intent to further or facilitate the conduct of the underlying illegal activities. In contrast, those responsible for more ministerial duties (such as the picking up or delivery of the funds being laundered) may not know all the details of their clients' activities, but are highly likely to be exposed to information that gives them actual knowledge (or reason to know) the true nature or source of the funds they are laundering. For these reasons, the Commission decided to adopt a bifurcated standard of intent that would encompass both the directors and the minions of a money laundering organization. At least one state (Arizona) has recently enacted a money laundering statute that employs a bifurcated standard of intent, and that specifically uses the standard of knowledge or "reason to know" for "second-degree" money laundering. (See Appendix A.) Moreover, two of the bills pending in this Committee (S. 572 and S. 1385) also propose the use of the bifurcated standard of intent.

S. 1335 also employs a bifurcated standard of intent, although it substitutes the concept of recklessness for the concept of reason to know. It should be noted, however, that the underlying objective of the Commission's proposal is substan- substantially similar to that of S. 1335: despite the difference in terminology, both seek to ensure that a money launderer may be held to account even if he did not have actual knowledge that the funds he was laundering were the proceeds of, or were directly or indirectly derived from, an unlawful activity. The Commission's approach to this problem was intended solely to reaffirm the longstanding rule that, where knowledge of the existence of a particular fact is an element of an offense, the government can meet its burden of proof by proving beyond a reasonable doubt that the defendant was aware of a high probability of the existence of that fact, unless he actually believes that that fact does not exist. See generally United States v. Jewell, 532 F.2d 697, 700-01 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). This rule, as stated in Section 2.02(7) of the Model Penal Code, is intended to deal with the situation known as "wilful blindness" or "conscious avoidance of knowledge," in which "a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance . . . ." G. Williams, Criminal Law: The General Part §57, at 157 (2d ed. 1961). See Model Penal Code §2.02(7) comment 9 at 129-30 (Tentative Draft No. 4 1955). In applying this rule, courts will look to all the circumstances pertinent to the person's intent. See, e.g., United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984); United States v. Jacobs, 475 F.2d 270, 287-88 & n.37 (2d Cir. 1973).

Similarly, the recklessness standard in S. 1335 would require courts to look to all the circumstances of the transaction (including, but not limited to, the amount and type of funds or monetary instruments and the nature of the

transaction) to determine whether a person is aware of a substantial risk that such funds or monetary instruments represent the proceeds of, or are derived directly or indirectly from the proceeds of, an unlawful activity, but disregards the risk. This standard of reckless disregard, of course, is not identical to the standard of actual knowledge or "wilful blindness." See McAllister, 747 F.2d at 1275. Its principal focus is the standard of care that a reasonable person would exercise in such a situation. Although the definition of this standard uses certain words and phrases found in the Model Penal Code's definitions of recklessness and negligence, see Model Penal Code §2.02(2)(c), (d), it clearly contemplates that courts will conduct a subjective inquiry into the person's appreciation of the risks involved in his conduct. See P. Low, J. Jeffries, & R. Bonnie, Criminal Law 232 (1982).

The reasons for specifying that "all the circumstances of the transaction" include the amount and type of funds or monetary instruments, as well as the nature of the transaction, are clear. In many instances involving the laundering of narcotics proceeds, for example, even the most elementary details of the transaction reflect the effort to launder: (1) the predominant use of small-denomination bills -- ones, fives, tens, twenties, and, sometimes, fifties; (2) a substantial volume of bills used in the course of a single transaction; (3) the appearance of counterfeit bills, which are often included in payments for narcotics, in large-volume deposits of bills; (4) unusual methods of transporting funds or monetary instruments for a transaction (such as cardboard boxes, suitcases, duffel bags, flight bags, gym bags, and even garbage bags); and (5) unusual behavior by persons involved in the transaction (such as the failure or refusal of persons initiating a transaction to identify themselves or to take receipts for any funds deposited in a financial institution). In addition, the Commission's interim

report sets forth (at page 55) several general patterns of behavior that are characteristic of persons who may be engaging in money laundering.

One other issue concerning the standard of intent was raised in testimony before the Subcommittee on Crime of the House Judiciary Committee by Kenneth Albers, on behalf of the National Council of Savings Institutions. According to Mr. Albers's testimony, a bank teller who is innocent of any involvement in a money laundering operation, but who may have actual knowledge that monetary instruments offered for deposit are derived from an illegal source, would presumably be violating the proposed section 1956 if the teller were to complete the transaction with the intention of notifying a supervisor or law enforcement agency after the completion of the transaction.

Although it is highly unlikely that a United States Attorney or an Organized Crime Strike Force Chief would find substantial merit in prosecuting a teller in those circumstances, the matter warrants some clarification. While it seems clear that no reputable financial institution would want to hold itself out as a haven for criminal proceeds, the fact remains that Federal law enforcement agencies may want financial institutions, on occasion, to begin or to continue accepting deposits from suspected money launderers. By authorizing or permitting what might be termed "controlled deliveries" of criminal proceeds to financial institutions, Federal law enforcement agencies can better determine the scope and extent of a money laundering operation and amass sufficient evidence to indict and convict the leaders of such an operation.

For these reasons, it may be appropriate to clarify in the legislative history that an officer or employee of a financial institution who knows or suspects that monetary instruments being

offered for deposit have an illegal source will not be deemed to have the requisite intent under section 1956, if that officer or employee notifies a Federal law enforcement agency of that knowledge or suspicion either before the transaction is completed or immediately thereafter (i.e., no later than the end of that day).

The Right to Financial Privacy Act

I would now like to turn to a second principal topic: the changes that S. 1335 proposes in the Right to Financial Privacy Act. Although this topic may not be one for which this Committee is primarily responsible, the Committee should understand that the changes which S. 1335 proposes in the Act would have an important bearing on the effectiveness of the proposed money laundering offense.

Earlier this year, a representative of the American Bankers Association was quoted as saying that the provisions of the Administration's money laundering bill "would virtually repeal all the protections established by Congress in 1978 when it approved the . . . Act." That statement, in my view, is wholly without foundation: nothing in either the text or the accompanying explanation of the proposed changes contemplates either a total or a partial repeal of the Right to Financial Privacy Act. A careful examination of these changes will demonstrate that they are carefully crafted to deal with certain specific problems that came to the Commission's attention in the course of preparing its interim report on money laundering.

In general, the Act prohibits a Federal Government entity from obtaining access to, copies of, or information contained in the financial records of any customer from a financial institution, unless the customer grants his or her consent or the Government authority obtains an administrative subpoena or

summons, a search warrant, a judicial subpoena, or a formal written request for disclosure of such financial records. 12 U.S.C. §3402. (Grand jury subpoenas and court orders issued in connection with grand jury proceedings have a special exemption from most provisions of the Act. Id. §3413(i).) A number of provisions in the Act appear to be based on the assumption that a Government authority is likely to seek financial records from a financial institution only after that authority has already opened a formal investigation or initiated formal proceedings of some type. See U.S.C. §§3401(7), 3405(1), 3406(a), 3407(1), 3408(3), 3409(a), 3412(a), 3420.

One issue which the Act does not clearly address, however, is the extent to which a financial institution that suspects one of its customers of money laundering or other illegal activities involving that institution may notify Federal law enforcement authorities of that suspicion, and thereby prompt the opening of a formal investigation. Section 1103(c) of the Act states only that nothing in the Act "shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation." 12 U.S.C. §3403(c) (emphasis supplied). A strict reading of this provision would permit the financial institution to notify the Government authority only that it "has information which may be relevant," but not to disclose any of the information or the reasons that the financial institution considers such information to be relevant.

Because sections 1117 and 1118 of the Act authorize customers to seek damages and injunctive relief against a financial institution or Government authority that obtains or discloses financial information in violation of the Act, a number

of financial institutions apparently have adopted the strict reading of section 1103(c). Although there do not appear to be any reported Federal judicial decisions that would support this reading of the statute, one state judicial decision in 1979 held that a bank which had provided local police with information concerning one of its customers had wrongfully disclosed information concerning the customer's account without obtaining the express or implied consent of the customer to that disclosure. See Suburban Trust Co. v. Waller, 44 Md. App. 335, 408 A.2d 758 (Md. Ct. Spec. App. 1979).

To clarify the issue in a manner that would permit financial institutions to notify law enforcement authorities of ongoing money laundering activities, the Commission proposed that section 1103(c) of the Act be amended to authorize financial institutions to disclose sufficient information concerning a possible violation of law, so that a law enforcement agency could determine whether to open a formal investigation on the basis of that information. In addition, to allay financial institutions' concerns about possible civil liability for such disclosures, the Commission proposed that section 1117(c) of the Act be amended to create a good-faith exception as an absolute defense to a civil action brought by a customer. Both of these proposals are substantially reflected in section 3(a)-(d) of S. 1335.

A recent article in the American Banker states that under the provisions of a counterpart to S. 1335, H.R. 2786, "bank employees would be required to volunteer records of clients where irregularities are discovered." That statement, too, is wholly without foundation. The object of these proposals, as I have explained, is not to compel financial institutions to disclose financial records indiscriminately, or -- as the article insists -- to "empower investigators to pore over individual bank accounts at will." The object is simply to enable -- not to

compel -- financial institutions to notify law enforcement authorities of possible illegal activity without incurring civil liability under the Right to Financial Privacy Act.

Another issue which the Act does not clearly address concerns the assertion, made by a number of banks to Federal law enforcement officials, that even when a Federal entity has complied with the Act in serving a grand jury subpoena for financial records, the financial institution is required by state law or state judicial decision to disclose the receipt of that subpoena to the customer whose records are being sought. Such notification, however, can create substantial impediments to the investigation of criminal activity. As the United States Supreme Court unanimously concluded last year in the O'Brien decision,

> [notice to third parties] would substantially increase the ability of persons who have something to hide to impede legitimate investigations by [an agency]. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the [agency]. More would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer . . . funds so that they could not be reached by the Government.

Securities and Exchange Commission v. Jerry T. O'Brien, Inc., 52 U.S.L.W. 4815, 4819 (U.S. 1984).

To date, there has been no definitive judicial resolution of whether the Supremacy Clause of the United States Constitution would require provisions of state law to give way to any provisions of the Right to Financial Privacy Act with which the state law is in conflict. Compare United States v. First Bank, 737 F.2d 269 (2d Cir. 1984) (holding that under Supremacy Clause, notice provisions of Connecticut Financial Privacy Act preempted by provisions of Internal Revenue Code governing IRS summons),

and In re Grand Jury Subpoena (Connecticut Savings Bank), 481 F. Supp. 833 (D. Conn. 1979) (holding that under Supremacy Clause, Connecticut statute imposing notice and challenge procedure must give way to Federal grand jury subpoena), with In re The Grand Jury Subpoena East National Bank of Denver, 517 F. Supp. 1061 (D. Colo. 1981) (rejecting Supremacy Clause argument challenging judicially-created state expectation of privacy in bank records). To reconcile the concerns of Federal law enforcement authorities and financial institutions, the Commission proposed that the Right to Financial Privacy Act be amended to include an express provision preempting any state law or decision that is more restrictive than the Act in regulating disclosures of financial records under the Act. That proposal is substantially reflected in section 3(g) of S. 1335.

The American Banker article on H.R. 2786, to which I have already referred, states that [s]tate protection of client privacy would be preempted by the new bill." This statement, too, is wholly without foundation. The preemption provision in S. 1335 does not preempt all state laws or judicial decisions dealing with financial privacy. Its object is simply to ensure that state financial privacy laws that are more restrictive than the Right to Financial Privacy Act do not create an impediment to the effective investigation of Federal crimes.

Although there are additional provisions concerning the Right to Financial Privacy Act that I can discuss, I think that it might be appropriate to conclude my remarks at this point. I will be happy to answer any questions that the Committee members may have.

# # #

APPENDIX A

ARIZONA MONEY LAUNDERING STATUTE

13-2317. Money laundering; classifications; definitions

A. A person who acquires or maintains an interest in, transfers, transports, receives or conceals the existence or nature of racketeering proceeds knowing or having reason to know that they are the proceeds of an offense is guilty of money laundering in the second degree.

B. A person who knowingly initiates, organizes, plans, finances, directs, manages, supervises or is in the business of money laundering is guilty of money laundering in the first degree.

C. Money laundering in the second degree is a Class 3 felony. Money laundering in the first degree is a Class 2 felony.

D. In this section, "acquire" and "proceeds" have the same meaning as prescribed in section 13-2314.

The CHAIRMAN. Thank you very much, Mr. Harmon, for being here. I realize how busy you are, and we are very grateful for your appearing this morning.

Mr. Harmon, are there any recommendations from the President's Commission that have not been addressed in the administration bill?

Mr. HARMON. They have all been addressed. The administration takes a broader view of the money laundering problem, and for that reason, it appears to us that its scope is somewhat broader. But all of the issues are addressed in the administration bill.

The CHAIRMAN. Do you have any suggestions for any modifications or changes?

Mr. HARMON. No, Mr. Chairman.

The CHAIRMAN. Mr. Harmon, does the President's Commission support the "reckless disregard" standard in S. 1335, in spite of the fact that the Commission recommended a "reason to know" standard?

Mr. HARMON. The Commission has not addressed that issue in particular, Mr. Chairman. The reason that the Commission focused on the "reason to know" standard, the kind of negligence idea, was because we felt that there was the sufficient level of expertise and knowledge in the hands of financial institutions, which was the primary focus of the Commission's recommendations.

The administration's bill—it depends on how you look at the money laundering process—takes it a step further and recognizes that the money laundering process can begin before entry into a bank or financial institution and for that reason has adopted a narrower standard, it would seem to me.

The CHAIRMAN. The distinguished Senator from Arizona is here. Senator DeConcini, do you have any questions? This is Mr. Harmon, the Executive Director and Chief Counsel of the President's Commission on Organized Crime, Senator.

Senator BIDEN. Mr. Chairman, before the Senator proceeds, may I ask one question, because I am going to have to leave, and I will be very quick?

The CHAIRMAN. Yes.

Senator BIDEN. Actually, in fairness, I guess it is more like two questions. But in what sense do you characterize the administration's bill as being somewhat broader then the Commission's recommendation? In what way is it broader?

Mr. HARMON. The Commission attempted to address the bulk of laundered moneys which pass through financial institutions. The Commission's bill reaches beyond that and recognizes that there can be transactions that occur before financial institutions are involved. There can be a money laundering process, counting by machines, baling and weighing of money, and the administration's bill attempts to reach that, whereas that of the President's Commission does not seem to reach that far.

Senator BIDEN. Well, the other question I have is, in order to deal with the problem as you describe it, is there a need—I have been talking with the first witness about the Bank Secrecy Act—but the administration bill, as I understand it, unlike, as I understand it, Senator DeConcini's bill—and he is obviously here to speak to that—speaks to the Financial Privacy Act and does sever-

al things. It would preempt the State privacy laws which protect bank records, permit disclosure of customer records to the Government without notice or legal process if the bank has reason to believe, as we have been talking about, that the information may be relevant to a violation, and third, permit Federal prosecution for any State or Federal crime in which the proceeds of the crime are laundered.

These are changes that in my view go beyond a simple money laundering statute.

Would you comment on these three aspects of the administration's bill?

Mr. HARMON. The Commission has not addressed your third point in any way. I would be happy to go back to the Commission. We still have the issue under further study.

But there is this crazy quilt of varying State statutes that deal with the issues of financial privacy. It is a common experience of law that whereas the Right to Financial Privacy Act federally might permit disclosure that State statutes simply prevent.

There is, the Commission believes, a need for some uniform approach in this area, recognizing as it does that narcotics trafficking is essentially an international phenomenon as well as——

Senator BIDEN. So in short, there would be a need in the Commission's view, to be able to preempt State law relating to privacy.

Mr. HARMON. Yes, yes. On the issue of disclosure, I point, for example, to one case. Most people know of the case known as "the Pizza Connection." It is recounted to some degree in our report. As a result of notifications made by E.F. Hutton, the money that was being laundered by these Sicilian heroin traffickers literally disappeared. The trail went cold for several months; it set the investigation back for a very long time, and the money itself never was found.

And we think it is important to count upon the expertise of financial institutions. They may be able to see things that even trained investigators and agents simply cannot understand. It is a little bit too much, I would think, to expect FBI agents to understand the way in which money can be laundered through the international commodities market. So it is the Commission's recommendation that law enforcement be given the benefit of this expertise, and as I said before, simply put banks and financial institutions in the same position as any other citizen who believes that he or she may have seen a crime committed.

Senator BIDEN. Thank you.

I thank the Chairman.

The CHAIRMAN. Mr. Harmon, Senator Specter has some questions he would like you to answer.

Mr. HARMON. Yes, sir.

The CHAIRMAN. Is there anything further, Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman.

I would just like to commend the Chair for holding these important hearings, and I regret that I could not be present for longer and have other commitments, but I would like to leave four questions to be submitted for the record for a number of the witnesses, including Mr. Harmon.

Thank you.

The CHAIRMAN. If all the witnesses today will answer any questions submitted, it would be appreciated.

Senator Specter and Senator DeConcini both were State prosecuting attorneys, and their input here should be very valuable.

The distinguished Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman, and let me join the Senator from Pennsylvania in thanking you and welcoming the opportunity to hold these hearings on Senator D'Amato's bill, my bill, and Senator Thurmond's bill. I think the intent here is to make some corrections, and I appreciate the effort the chairman has put forth.

Mr. Chairman, I have introduced S. 1385, the money laundering bill, and I ask unanimous consent, because of my inability to be here, being at the Helsinki Commission hearings, that my full statement be entered in the record at the beginning of the proceedings this morning.

The CHAIRMAN. Without objection, the statement will be entered in the record following the statements of the other Senators.

Senator DECONCINI. I thank the chairman.

Mr. Chairman, I also have questions for Mr. Queen and for Mr. Trott, and I will ask Mr. Harmon a couple and then submit some.

Mr. Harmon, thank you for the fine work that you and the Commission have done and for your testimony here today.

I am particularly concerned in S. 1335, amendments to the Right to Financial Privacy Act, that would require a bank officer to determine, one, whether a violation of law may exist, and two, the relevance of information the bank may possess.

Do you believe this constitutes an appropriate delegation of responsibility to private citizens and organizations, or are we asking a bit too much of the banks?

Mr. HARMON. Well, it is the view of the Commission, expressed in its report, that any citizen who believes that he has information about the possible commission of a crime should be permitted to relay that information to law enforcement. And the Commission sees no distinction between a crime which may have been committed within a financial institution as opposed to one that has been committed outside a financial institution.

Senator DECONCINI. Then, you are saying that if a bank is in a fiduciary relationship as a trustee, and if they have any hint that there may be a violation, they should foresake that fiduciary responsibility based on the hint or the assumption or the belief, without actual proof. Is that the Commission's position?

Mr. HARMON. Well, there is a requirement that this belief be related to the commission of a very specific violation and that the information be relevant to the possible commission of that violation. It would seem to us that that is sufficiently specific for a financial institution to notify the law enforcement.

The way the law reads now, Senator, banks simply can say, "We have information about a possible violation, of some Federal offense, but we cannot tell you what that information is." That simply kind of gets them off the hook, but——

Senator DECONCINI. Does the Commission believe or have any evidence to think that often, banks not only have that information, but they are not about to even make that first disclosure?

Mr. HARMON. Yes; that has been my personal experience in law enforcement, and it has been our experience with the work of the Commission, that banks, even the case of documented money laundering situations, were not willing to disclose that information to the Commission.

Senator DECONCINI. Isn't it also true in your experience that numerous banks for a long period of time have failed to even report transactions of $10,000 deposits or more, even legitimate transactions of $10,000 or more? Is that accurate?

Mr. HARMON. The record is clear on that point, yes, Senator.

Senator DECONCINI. Doesn't that lead you to the conclusion that maybe a lot of bankers are not just going to come forward with that information when they cannot even comply with what I consider a relatively simple law?

My point is, it seems like we need more. I am not critical of the Commission. I am just exercising my observations here, that I would hope the Commission would expect, or provide for a greater involvement, not of the bankers, but of law enforcement, to insist that the bankers come forward, and that the law enforcement have some procedural right to go and ask that question, and get, even if it is in a classified or confidential nature to begin with, an answer, and then have some procedure to expose them. You do not think that is necessary, or you would——

Mr. HARMON. I think that would be effective, and I think many financial institutions simply do not want to be in the position of having information which they can disclose, which could be used to prove the commission of a crime.

Senator DECONCINI. According to some testimony of the American Bankers Association, the attorney general of California recently called the "reckless disregard" standard "an unclear standard which will pose compliance difficulties and unnecessarily complicate prosecution of the offense of money laundering."

Could you tell us what the "reckless disregard" standard means?

Mr. HARMON. The standard itself is spelled out in the proposed legislation. It is found in other areas of Federal law. It is also found repeatedly in areas of State criminal law.

For example, in the State of New York, one of the degrees of manslaughter requires a standard of intent involving "reckless disregard." It is a standard of intent that is found in many places in the law and in my experience, is one which juries very simply can understand.

Senator DECONCINI. Do you think it is better than "knows or has reason to know," the standard of "reckless disregard?"

Mr. HARMON. The Commission selected the standard of "reason to know" because the Commission's proposal focused exclusively on financial institutions, which have more knowledge and more expertise than the average person. The administration's bill went a little bit beyond that, thereby, in its broader reach, requiring a higher standard of intent. So it would seem to me that if the approach were taken for this broader reach, that it would be more appropriate to have a stricter standard of intent.

Senator DECONCINI. Would you agree—well, let me put it this way. You criticize an American Bankers article because it states that S. 1335 would preempt State protection laws. Although it is

true that S. 1335 would not preempt all State laws, isn't it true that it effectively preempts all State laws that conflict with it?

Mr. HARMON. That is correct, Senator.

Senator DECONCINI. That is correct. That is pretty much the same thing, it seems like to me—wouldn't you say?

Mr. HARMON. Yes, Senator.

Senator DECONCINI. Thank you. I just wanted to be sure I understood what your position was.

Has the Commission—this is just out of interest of my own—had an opportunity to follow laundering cases from the initial income to the organization to its actual legitimizing of the proceeds where they are disbursed out of the legitimate banking system with no trail?

Mr. HARMON. That is extremely difficult to do. Our analysis up to this point reaches the point where the cash is introduced into the financial system. The Commission has under study, and it will be the subject of another report, what happens to the money and the problems involved in tracing that money to its ultimate destination. So that issue is under study by us, and measures that might be taken further on down the road with regard to that issue will be presented in a subsequent report on that issue. But that is an extremely difficult process, as I am sure you understand.

Senator DECONCINI. Have you come across the laundering or exchanging of the illegitimate money—let us call it that—into real estate, and then the sale of that real estate at—I was going to say below market value in order to get the money laundered—but the sale of the real estate. Have you been able to trace it that far?

Mr. HARMON. That is a common practice in particular in south Florida, through corporations located primarily in the Caribbean Basin.

Senator DECONCINI. And then the problem comes after the real estate is purchased by the titleholder when it is sold, and what happens to those distributed funds—is that where you have the primary problem?

Mr. HARMON. Well, again, as I say, Senator, that is an issue under study by the Commission. If you have any suggestions for us in that area, we would be happy to report back to you.

Senator DECONCINI. I have some suggestions of some cases in Arizona here that I would like to have you look at. I am interested, as we all are, in what you derive out of this study as soon as possible, because I am not satisfied that S. 1385 addresses that, and I would love to have some more positive approach to it as to go at that transaction, if and when the Commission is available to share with us, officially or unofficially, any of that information.

Mr. HARMON. We would be happy to do that, Senator.

Senator DECONCINI. Thank you, Mr. Harmon. I have some other questions that I will submit, due to time, and thank you for your testimony today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator DeConcini.

Senator McConnell? Senator McConnell, I have some other engagements; if you would take over the rest of the hearing, I would appreciate it.

Senator MCCONNELL. Yes, I will finish it up for you, Mr. Chairman.

I would like to put an opening statement in the record at this point.

The CHAIRMAN. Without objection, that will be done.

[Statement follows:]

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I commend you for holding this hearing, and am pleased to be here this morning. I believe the legislation that we will consider today is important legislation, for it seeks to eliminate the huge profits, and relative ease with which those profits are gained, that now awaits unscrupulous criminals willing to engage in a wide variety of criminal activity. These activities include narcotics trafficking, income tax evasion, bribery, investment fraud, illegal tax shelter programs, securities fraud, prostitution and gambling. Each of the bills seeks to provide the Justice Department and the Government in general with greater ability to combat the abilities these criminal elements now have in laundering huge profits through various financial institutions, and then injecting them to the economy.

As Attorney General Edwin Meese noted when the Justice Department announced its proposal for S. 1335, of which I am pleased to be a cosponsor, "Professional money launderers play a key role for any criminal enterprise, whether its an organized crime family or a narcotic's ring. They are functionally equal to a fence utilized by the burglar. They provide a service to the thieves to hide or conceal illegal money. It takes a professional—a lawyer, an accountant, a banker, with all the trappings of respectability—to manipulate these sophisticated schemes."

In an effort to meet this problem head on, S. 1335, originally proposed by the Justice Department and introduced by Senator Thurmond, prohibits an individual or institution from conducting a transaction involving the movement of money generated by or derived from the commission of any crime. It goes further, and provides that anyone who conducts a money laundering transaction and has reason to know that the funds were derived from unlawful activity is liable for a civil penalty.

In addition, I am happy to note that S. 1335 proposes significant penalties for the crime of money laundering, with fines up to $250,000 or twice the amount of the money involved in the transaction, as well as a maximum prison sentence of 20 years.

S. 1385, introduced by Senator DeConcini, and S. 572, introduced by Senator D'Amato, may take a more narrow approach, attempting to strike a more "balanced" approach between the need to combat money laundering and organized crime and the competing interests of civil liberties and privacy. That is an issue that I hope we will learn more about today, though I believe it is safe to say there are significant restrictions on the Government's ability to access private information, notably the Right To Financial Privacy Act, among others.

I look forward to his testimony as well as that of each of the other witnesses here today. Thank you, Mr. Chairman.

Senator MCCONNELL [presiding]. Mr. Harmon, you may be excused, and thank you very much for your testimony.

We will move on to the panel including Neal Sonnett, chairman of the Legislative Committee and third vice president of the National Association of Criminal Defense Lawyers, Miami, FL; Richard Arcara, district attorney from Buffalo, NY, representing the National District Attorneys Association.

Gentlemen, we are running a little late. We would like to remind you that your testimony not exceed 5 minutes each, and we will put the full statements in the record.

Thank you.

Please proceed.

STATEMENT OF A PANEL, INCLUDING: RICHARD ARCARA, DISTRICT ATTORNEY, BUFFALO, NY, ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; AND NEAL R. SONNETT, CHAIRMAN, LEGISLATIVE COMMITTEE AND THIRD VICE PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MIAMI, FL

Mr. ARCARA. Mr. Chairman and members of the Senate Judiciary Committee, my name is Richard Arcara. I have served as a U.S. attorney for western New York for 6½ years, and part of that 6 years, as an assistant U.S. attorney, and presently, the district attorney of Erie County, Buffalo, NY. I speak to you today in behalf of the National District Attorneys Association.

Our association represents 6,300 local prosecutors from around the country. The National District Attorneys Association strongly supports and urges new legislation dealing with money laundering. We thank you for this opportunity to address our concerns regarding the various money laundering issues which you consider today.

My remarks will be confined to those proposed legislative changes which would create the new crime of money laundering, and to forfeiture proceedings.

The National District Attorneys Association's primary concerns are that the legislation be broad enough to provide the Government a most effective tool to combat organized criminal groups, from drug trafficking rings to more traditional organized crime "families," yet narrow enough to avoid cumbersome, unnecessary, undesirable intrusions into the matters of State concern.

The administration's proposal, S. 1335, attempts to provide the Government with the ability to strike at virtually all money laundering operations, but we feel that a literal interpretation of the administration's legislation may result in unintended Federal intrusions into crimes which are better suited to State prosecution. Specifically, any crime involving the transfer of money, checks or other monetary instruments could be considered a money laundering "transaction" under the administration's proposal. A theft, a robbery, a bad, forged, or altered check would become a Federal money laundering offense.

In the other body of this Congress, there exist several proposals which would restrict the predicate offenses required for the crime of money laundering to Federal RICO offenses. There are proposals in the Senate as well as the House, including S. 1385, that limit the definition of money laundering transaction to a transaction involving a financial institution. While these more restrictive approaches avoid the intrusiveness of the administration proposal, they are more restrictive in the effectiveness of the proposed money laundering offenses.

Organized crime does not confine its money laundering operations to financial institutions nor does organized crime limit its illegal but profitable operation to violations of the RICO statute.

While we believe the rationale for these restrictions, we feel that the desired harmony with the State law may be achieved through means which would afford the Federal Government a great opportunity to assail money laundering operations.

We come here not to criticize, but to offer constructive alternatives which may reconcile the two important concerns of federalism and effective law enforcement.

First, we recommend as an alternative to the limitation and scope to RICO offenses that the prohibited transaction be defined in such a manner that State crimes would not constitute a "transaction." Perhaps the transaction could be defined as a voluntary, nonfraudulent transaction between the parties. This should eliminate conflict with existing State laws.

As an additional safeguard, we recommend that a jurisdictional threshold be imposed, such as a $10,000 minimum, in the definition of the proscribed transaction. This limit should not hinder the money laundering legislation's effectiveness, since the Federal Government lacks the resources to pursue smaller incidents.

Also, it is unlikely that organized crime would engage to any great degree in laundering operations smaller in size.

Second, we recommend that the offense include the laundering of money obtained from State crimes as well as Federal crimes. Since little if any State regulation exists in this area, and since the control of organized crime is historically and logically an area for Federal legislation, we feel comfortable with the application of the proposed Federal money laundering offense to the illicit proceeds of State crimes.

Finally, we are quite concerned that the forfeiture provisions of the administration's proposal could lead to unnecessary interference with State forfeiture proceedings. Approximately one-half of the States provide for the forfeiture of proceeds of illicit activities. It would cause serious discord between the Federal and State enforcement agencies if Federal agencies were allowed to preempt State forfeiture proceedings.

Therefore, if this committee is inclined to include a forfeiture provision, we would urge you to codify a policy granting deference to State forfeiture laws or, at the very least, prohibiting Federal preemption of previously initiated State forfeiture proceedings.

I thank you for your attention and stand ready to answer any questions.

Senator McCONNELL. Thank you.

Mr. Sonnett.

STATEMENT OF NEAL R. SONNETT

Mr. SONNETT. Senator, the National Association of Criminal Defense Lawyers recognizes that drug trafficking and organized crime are serious problems, and we agree that there is a need for legislation that would clearly and specifically make money laundering a crime.

We believe that such legislation must, however, be carefully drawn and crafted, and we have attempted in our written statement to analyze all of the major aspects of the three bills pending before this committee.

In my summary, I wish to highlight one or two of those concerns. The primary concern of the National Association of Criminal Defense Lawyers is in the bifurcated standard of intent that has been adopted in each of the three bills. Two of the bills use a standard of

"reason to know," and the administration's proposal, S. 1335, uses a standard of "reckless disregard."

We strongly oppose the adoption of either provision, because it would, in our view, result in liability for prosecution to entire classes of individuals and corporations who were not involved in any way in money laundering as that term is commonly understood or reasonably defined.

A hypothetical example that I set out in my written testimony, I think, illustrates the pitfalls—the hypothetical of the gentleman arrested and whose arrest is wide attention in the media. The next morning he posts bail, paid by a bondsman, picks up his payroll checks, which have been prepared by his accountant, distributes them to his employees, and then stops at his bank to make his mortgage payment; he goes to his long-time barber for a haircut and a manicure, keeps a late-morning appointment with his dentist, lunches at his country club, attends his weekly psychiatric therapy session, services his car, picks up groceries and arrives home, as his wife is paying the housekeeper. Under either the "reason to know" or the "reckless disregard" standard, I suggest that the bail bondsman, the accountant, the furniture store employees, the barber and the manicurist, the dentist, the waiter, the maitre'd at the country club, the psychiatrist, the car dealer, the grocer, and the housekeeper would all be subject to prosecution.

Perhaps most importantly, the same problems created by the use of this lesser than standard of intent also pose very serious sixth amendment problems which permeate this legislation.

I cannot overemphasize, Senators, the enormity of the problems that these provisions pose to the future of the criminal justice system. Simply put, it is our view that passage of such legislation would likely mean an end to the retained criminal bar as we know it, and the demise of our balanced adversarial system of justice. If the individual in our hypothetical situation had attempted to retain a lawyer, his attempts would have, of necessity, been rebuffed, for any lawyer who agreed to represent him and who accepted a fee for that representation would have assumed a real risk of criminal prosecution under the proposed section 1956(a)(2) as set forth in these bills, as well as under the newly created offenses of "Facilitation" and "Receiving the Proceeds of Crime.

Finally, we are concerned about the Governments' position that attorneys' fees should be subject to forfeiture under both current law and the forfeiture provisions of the administration's proposed legislation. That concern over governmental intrusion into the fundamental right of an accused to retain counsel of his choice is what caused the American Bar Association to issue a report that was adopted at the annual meeting this past July, by the ABA House of Delegates in Washington. The recommendation stated that the American Bar Association disapproves of the use of forfeiture provisions in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct or has accepted a fee as a fraud or sham, or to protect illegal activity of a client.

We very strongly believe that any legislation which is passed by this committee should be carefully crafted to balance the rights of the innocent citizens of this country, as well as to preserve and to

protect the fundamental sixth amendment rights that all people have to retain counsel of their choice.

That concludes my summary, and I am more than happy to answer any questions you may have.

[Statement follows:]

STATEMENT OF

NEAL R. SONNETT
Third Vice-President
Legislative Chairperson

ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

I.

INTRODUCTION

Mr. Chairman and Members of the Committee, I greatly appreciate the opportunity to appear before you today on behalf of the National Association of Criminal Defense Lawyers, which I presently serve as Third Vice-President and Legislative Chairperson.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 4,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights, and concerned with the proper administration of the criminal justice system. The NACDL was founded 26 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. The Association attempts to ensure that the rights and liberties of individuals accused of criminal offenses are protected. We pursue those goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action and by appearing as amicus curiae in cases which present issues of significant import to the criminal justice system. Among NACDL's stated objectives is the promotion of the proper administration of individual rights and the improvement of the criminal law, its practices and procedures.

While I appear today as a representative of the NACDL, I believe I bring a varied background and experience to the issues that are the subject of today's hearing. I am currently a senior partner in the Miami, Florida law firm of Bierman, Sonnett, Shohat & Sale, P.A., specializing in the defense of federal criminal cases, and I am an Adjunct Professor of Criminal Law, in Advanced Federal Criminal Procedure, at the University of Miami School of Law. Prior to entering private practice in 1972, I served for nearly five years as an Assistant United States Attorney for the Southern District of Florida and as Chief of the Criminal Division in that office, supervising all federal criminal prosecutions for one of the nation's busiest judicial districts. I am proud that my work was recognized by several citations from the Department of Justice, and that I was named the outstanding South Florida Federal Employee of 1972, from among 12,500 federal employees.

In addition to serving as a Vice-President of NACDL, I also serve this year as President of the National Caucus of Metropolitan Bar Leaders of the American Bar Association, which represents the leadership of the 42 largest local bar associations in the country, with a constituency of over 150,000 lawyers. I am also the immediate Past President of the Florida Criminal Defense Attorneys Association and a Past President of the Dade County Bar Association. I emphasize, however, that I appear here today only on behalf of the NACDL.

As an active criminal defense attorney, I have served as lead counsel in several so-called "money laundering" trials, including cases involving Operation Bancoshares, Operation Sword-fish and Operation Greenback.

II.

CONCERNS OF THE NACDL

The NACDL recognizes that drug trafficking, organized crime and the laundering of illicit profits through our nation's financial institutions are serious problems that tear at the very

fabric of our democracy. Our members are good citizens as well as officers of the court, and our ethical obligation to protect the constitutional right of the accused to a fair trial does not diminish our collective outrage over organized criminal activity. We therefore share the concerns of this Committee, and we applaud your efforts to find more effective ways of combatting this national cancer.

Indeed, criminal defense lawyers have a special obligation to assist in the fight against crime, since honest lawyers who defend unpopular cases or notorious clients often have found themselves unfairly criticized by those who lack a full understanding of the nature and function of our adversary system of justice. The role of criminal defense lawyers has been tarnished unjustifiably by a few lawyers who have engaged in unethical and unlawful conduct. The NACDL is both saddened and angered that these "renegade attorneys", as they were characterized in a study prepared by the staff of the President's Commission on Organized Crime, have violated their sworn oaths as officers of the court by acting "to advance the criminal purposes of...criminal organizations". 1/ Such corrupt and dishonest lawyers, no less than corrupt bankers, accountants, airline operators, law enforcement officers or public officials, must be exposed, prosecuted, and subjected to the full penalties of our country's criminal laws.

The proper balance between effective law enforcement and individual liberty is often a complex and complicated equation. The NACDL recognizes the importance of both interests, and it is in that spirit that we are pleased and privileged to offer our views and recommendations to this Committee as it considers the provisions of proposed legislation relating to the control of money laundering. These observations shall be directed principally to S. 572, the "Money Laundering Crimes Act", S. 1335, the "Money Laundering and Related Crimes Act of 1985", and S. 1385, the "Money Laundering Crimes and Disclosure Act of 1985".

III.

GENERAL CONSIDERATIONS

Despite the fact that money laundering is not a specifically defined federal offense, the United States Department of Justice, the Department of the Treasury, and investigative agencies such as the FBI, DEA, IRS and U.S. Customs, deserve much credit for their efforts in investigating, detecting and successfully prosecuting money laundering cases. The Department of Justice has used a wide variety of existing federal statutes, under Titles 12, 18, 21, 26 and 31 of the United States Code,[2] to secure criminal convictions in money laundering cases.[3]

As an active criminal defense lawyer in Miami, Florida, the birthplace of Operation Greenback, Operation Swordfish, Operation Bancoshares, and other similar investigations, I know from my own trial experiences of the consistent and outstanding successes that the Department of Justice has had prosecuting offenses related to money laundering under currently available federal statutes. I should also note that much credit is due to the dedicated leadership of former United States Attorney Stanley Marcus, recently appointed to the United States District Court for the Southern District of Florida, to current acting United States Attorney Leon Kellner, and to outstanding law enforcement agents of the IRS, the DEA, the FBI, and U.S. Customs. In addition to significant convictions at the trial level, federal prosecutors have been successful, on review of criminal cases, in convincing appellate courts to affirm the applicability of existing statutes to money laundering activities.[4]

Notwithstanding past successes, we recognize the compelling need for new legislation that would clearly and specifically make money laundering a federal criminal offense, as well as for amendments to existing legislation that would improve the ability of the federal government to investigate and prosecute money laundering and organized criminal activity. We strongly urge, however, that such legislation be crafted with careful consideration for the

privacy rights of law-abiding citizens and for the Due Process rights of the citizen accused, particularly the fundamental right of an accused to be represented by counsel of his or her choice.

IV.

LAUNDERING OF MONETARY INSTRUMENTS
(PROPOSED 18 U.S.C. §1956)

S. 572, S. 1335, and S. 1385 each create a new criminal defense (proposed 18 U.S.C. §1956) of laundering of monetary instruments. S. 572 and S. 1385 substantially adopt the recommendations of the President's Commission on Organized Crime,[5] while S. 1335 embodies the proposals of the Administration.[6]

A. Standard of Intent

All three of the proposed Bills adopt a bifurcated standard of intent. While we believe the first standard of intent is appropriate and clearly defined, we have grave reservations about the second standard of intent, which is unwise and fraught with constitutional infirmities.

1. Proposed 18 U.S.C. §1956(a)(1)

The first standard of intent tracks the language currently found in the Travel Act [18 U.S.C. §1952(a)(3)] and proscribes acts conducted "with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity". We have no difficulty with this standard of intent, which, in the context of the Travel Act, has been consistently upheld by the Courts.[7]

As a constructive suggestion which we believe will further clarify and strengthen this section, we respectfully recommend that the Committee consider adding a provision, also found in the Travel Act [§1952(a)(1)], that would proscribe acts conducted with the intent to "distribute the proceeds of any unlawful activity".

2. Proposed 18 U.S.C. §1956(a)(2)

S. 572 and S. 1385 both proscribe certain acts committed:

> with knowledge or reason to know that such monetary instruments represent income derived, directly or indirectly, from any unlawful activity, or the proceeds of such income (emphasis added).

S. 1335, while similar, substitutes "reckless disregard" for the "reason to know" standard in the other bills.

The NACDL strongly opposes the adoption of either provision, because it would, in our view, result in liability for prosecution to entire classes of individuals and/or corporations who were not involved in any way in "money laundering" under any commonly understood or reasonable definition of the term. Consider, for example, the following hypothetical case:

> Sam Smuggler, the owner of a Danish furniture store, is arrested for smuggling cocaine in imported furniture crates. His arrest receives prominent attention in the print and electronic media. The next morning, following his release on bail posted by a bondsman, he picks up his store's payroll checks which have been prepared by his accountant and distributes them to his employees. He then stops at his bank and makes his mortgage payment to his friendly banker. Sam goes to his long-time barber for a haircut and a manicure, keeps his late morning appointment with his dentist, and then lunches at his usual table at the country club. After lunch, Sam attends his weekly therapy session with his psychiatrist, stops at the auto dealership where his car is being serviced, picks up groceries at his friendly neighborhood market, and arrives home just as his wife is giving their housekeeper her weekly salary.

Under either the "reason to know" or "reckless disregard" standard, the bail bondsman, the accountant, the furniture store employees, the barber and the manicurist, the dentist, the waiter and maitre d' at the country club, the psychiatrist, the car dealer, the grocer and the housekeeper would all be subject to prosecution. Because of the widespread publicity of Sam's arrest, each may have had reason to know, or to be aware of a substantial risk that the funds they received were derived "directly or indirectly" from the proceeds of an unlawful activity. The statute, obviously, does much more than require that these individuals open their eyes to the objective realities of the financial transaction.[8/]

In testimony before the Subcommittee on Crime of the House Committee of the Judiciary on July 24, 1985, the Honorable Jay B. Stephens, Associate Deputy Attorney General of the United States, noted that the Administration had decided upon a "reckless disregard" standard of intent, rather than the mere "reason to know" standard which was recommended by the President's Commission on Organized Crime. He stated:

> The term "reckless disregard" is used in at least three other statutes in title 18 and is to be contrasted sharply with a mere "reason to know" or "negligence" standard which was recommended by the Commission on Organized Crime. After careful consideration, we concluded that a "reason to know" standard was not suitable for subjecting a person to either the serious criminal or civil sanctions set out in the new money laundering offense. [footnotes omitted]

The NACDL agrees with Mr. Stephens that the "reason to know" standard of intent is inappropriate, and we urge this Committee to reject it. Moreover, we strongly maintain that the "reckless disregard" standard of intent embraced by the Administration is only slightly less egregious, and creates other problems which arise from the imprecision of the proposed statutory language in S. 1335.

First, the definition of "reckless disregard" refers to an awareness that the funds were derived from "any unlawful activity". Does that mean that an individual could be prosecuted if he were "aware of a substantial risk" that the funds were derived from an unlawful activity different from that charged, or must the proof show awareness of the specific unlawful activity charged by the government? The statute does not make any distinction between these differing types of knowledge, an omission which is fraught with legal and practical problems.9/

Second, the "substantial risk" is defined as that which is of "such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation." What are the limits of this standard? Are the actions of a "reasonable

person" guided by the knowledge possessed by persons who deal in the type of business transaction involved? What standard of care would the jury be instructed to apply?

The Administration's justification for use of a "reckless disregard" standard of intent based upon its use in other statutes is clearly misplaced. At the outset, the Administration has drafted its own definition of "reckless disregard" in the proposals embodied in S. 1335 that does not appear in the statutes cited by Mr. Stephens. Moreover, in each of the cited statutes, the accused is in "reckless disregard" of a situation which he himself created.10/ In contrast, the Administration's proposal proscribes the "reckless disregard" of a situation created not by the accused, but by other persons. We suggest that any comparison with other statutes, and therefore any justification for this standard, is invalid.

Finally, even the two hypothetical cases suggested by Mr. Stephens in his testimony before the House Crime Subcommittee fail to demonstrate the suggested need for the low standard of intent defined as "reckless disregard." The hypothetical attorney and the hypothetical bank employee who, for a 10% fee, accept a suitcase containing $500,000 in currency from a construction worker and deposit the money in small amounts in several different banks or bank accounts, and then wire transfer it to foreign banks are, indeed, acting reprehensibly and warrant prosecution. They both are violating existing federal criminal laws. Both could be prosecuted successfully, as conspirators or as aiders and abettors, for violation of the currency reporting laws or for the use of a wire transfer to distribute the proceeds of an unlawful activity, or to facilitate the promotion, management, establishment, or carrying on, of an unlawful activity in violation of 18 U.S.C. §1952(a).

For these reasons, the NACDL respectfully submits that this portion of S. 1335 is not appropriate, not necessary, and is bad law.

B. The Scope of the Proposed Offense

While the NACDL supports legislation specifically intended to deal with money laundering transactions, we respectfully urge the Committee to disapprove the use of statutory proposals that go unnecessarily and perilously beyond these target offenses. The most glaring example of such overbreadth can be found in S. 1335 which, by its terms, can be applied in almost any circumstance involving the exchange of funds before, during, or after any federal or state criminal offense. This absurd and potentially dangerous result is reached through an all-embracing definition of the term "unlawful activity" [proposed §1956(c)(5)] and open-ended definitions of the terms "conducts" [proposed §1956(c)(1)], "transaction" [proposed §1956(c)(2)], and "monetary instruments" [proposed §1956(c)(3)]. Under these definitions, S. 1335 applies to any financial transactions, not just those involving financial institutions, and thus, can be directed at anyone involved in the exchange of funds, whether or not involved in or knowledgeable about the criminal offense itself. Both S. 572 and S. 1385, by contrast, define "unlawful activity" and "transaction" in terms that are more fairly focused on, and properly limited to, the activities sought to be proscribed.

Not only do these provisions present serious problems of federalism and intrusion into areas traditionally left to the States, they pose substantial constitutional problems, particularly with respect to the Sixth Amendment right to counsel.

V.

SUBSTANTIVE SIXTH AMENDMENT CONCERNS

As we have already noted, adoption of a standard of intent which authorizes prosecution based upon mere knowledge, reason to know or reckless disregard that the monetary instruments represent income derived, directly or indirectly, from any unlawful activity, or the proceeds of such income, would expose innocent persons to serious criminal liability. For that reason, we urge this Committee to limit criminal liability to those who act with

intent to distribute the proceeds of an unlawful activity or to promote or facilitate the promotion of unlawful activity. That result would also remedy what we view as serious Sixth Amendment problems which permeate the standard of intent in proposed §1956(a)(2). I cannot overemphasize the enormity of the problems this provision poses to the future of our system of criminal justice. Simply put, passage of such legislation would likely mean an end to the retained criminal bar as we know it, and the demise of our balanced adversarial system of justice.

A defendant's Sixth Amendment right to counsel encompasses the right to employ the attorney of his or her choice. United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). The rule is well-established that "[a]n accused who is financially able to retain counsel must not be deprived of the opportunity to do so." United States v. Burton, supra; Linton v. Perini, 656 F.2d 207, 208 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). This right may only be denied a defendant if he or she exercies it in bad faith in an attempt to manipulate the Court. See United States v. Gipson, 693 F.2d 109, 111 (10th Cir. 1982), cert. denied, 459 U.S. 1216 (1983).

If Sam Smuggler, the indicted furniture store owner in the hypothetical case mentioned earlier, had attempted to retain criminal defense counsel during his busy day, his efforts would have, of necessity, been rebuffed. For a lawyer who agreed to represent Mr. Smuggler, and who accepted a fee for that representation, would have assumed a real risk of criminal prosecution under proposed §1956(a)(2), as set forth in S. 572, S. 1335 and S. 1385.[11/]

It is not unreasonable to expect the government to argue that a criminal defense lawyer, of all people, is in a unique position to possess knowledge or reason to know or to have acted with reckless disregard of the fact that the client's funds were proceeds of or were derived directly or indirectly from the proceeds of any unlawful activity.[12/] What standard, if any, could a criminal defense practitioner employ to satisfy himself that a fee accepted from, for example, E.F. Hutton or the Bank of Boston,

was not derived indirectly from the proceeds of their unlawful activity? Perhaps more to the point, what standard could the criminal defense practitioner employ to satisfy the government that his fee came from an untainted source? Finally, even if the ethical criminal defense lawyer sought and received assurances that his fee was untainted, how could he relay those facts to the government without also revealing communications protected by the attorney-client privilege?

Even in those situations where fees for legitimate, arms length legal services may be "derived, directly or indirectly, from any unlawful activity, or the proceeds of such income", the ethical criminal lawyer should not be faced with the Hobson's choice of refusing to appear or being subjected to serious criminal prosecution. Moreover, placing a suspect or an accused in the position of being unable to retain a competent, honest lawyer to defend him offends sacred constitutional principles.

It is not satisfactory to answer that a defendant so situated could request and receive a public defender. Such a response ignores the fundamental, if not absolute, right to counsel of one's choice; it turns the cherished presumption of innocence into a sword which must be wielded by a defendant to prove his innocence; it threatens to collapse an already overburdened public defender system into a bureaucratic nightmare of socialized criminal law.

Clearly, there is no appropriate standard by which an ethical defense attorney could avoid prosecution under proposed §1956(a)(2), or under the two new offenses proposed in S. 1335. Unless criminal liability is limited to those who act with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of unlawful activity, the result will be the removal of the adversary from the adversary system.

The NACDL respects the well-intentioned efforts of these legislative proposals to fight crime, but we cannot believe that the war on crime requires a nuclear arsenal to permit the govern-

ment to annihilate the right to counsel and the entire adversary system of justice. These are grave concerns which we know will receive careful consideration by this Committee.

VI.

OTHER PROPOSALS IN S. 1335

S. 1335, which embodies Adminstration proposals, contains several other provisions, not present in S. 572 and S. 1385, which we believe merit further discussion.

A. Criminal and Civil Forfeiture Provisions

Section 9 of the Administration's proposed legislation would add a new chapter to Title 18 of the United States Code to provide for civil forfeiture (proposed 18 U.S.C. §2600) of funds or monetary instruments involved in violation of the new Money Laundering Offense, and of money or other property involved in a violation of the new offense of Receiving the Proceeds of a Crime. In addition, proposed 18 U.S.C. §2600(f) creates a "relation back" theory which vests title in the United States upon commission of the act giving rise to forfeiture.

This Section also provides for criminal forfeiture (proposed 18 U.S.C. §2601), upon conviction, of any money or other property involved in the above-mentioned offenses and any money or other property which represents the proceeds of or which is traceable to such money or property. Proposed 18 U.S.C. §2601(b) allows for the forfeiture of "substitute assets" if the forfeitable property cannot be located, has been transferred to a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty.

Because of the extraordinarily broad application of the underlying statutes which give rise to the forfeitures, these proposed civil and criminal forfeiture provisions would give the government unprecedented and unwarranted forfeiture authority over almost all federal and state felonies. Criminal forfeitures are

now provided for in a variety of existing statutes.[13/] Expansion of present forfeiture provisions must be approached with great care and should be based on considerations of fairness to the citizenry and necessity for law enforcement.

The greatest concern of the NACDL deals with the destructive impact that both current and proposed forfeiture provisions have on the Sixth Amendment right to counsel. The Department of Justice has interpreted the forfeiture provisions of the Comprehensive Crime Control Act of 1984 to authorize the forfeiture of attorneys' fees in narcotics and RICO offenses. These attempts to forfeit attorneys' fees raise fundamental questions which strike at the heart of our criminal justice system.

The concern over such governmental intrusion into the fundamental right of an accused to retain counsel of his choice caused the Criminal Justice Section of the American Bar Association to issue a Report and Recommended Resolution to the House of Delegates of the ABA at their Annual Meeting here in Washington, D.C. this past July. The Criminal Justice Section Report concluded:

> CONCLUSION AND SUMMARY
>
> The foregoing report, and the cases cited in it, provide ample illustration of the dramatic detrimental impact that forfeiture of attorneys' fees is having on our system of criminal justice. It is worthwhile summarizing these effects as a means of concentrating attention on the magnitude and breadth of their impact.
>
> Accordingly, the following list recites the more serious ramifications of the attorney fee forfeiture practice:
>
> 1. It denies an accused the right, under the Sixth Amendment, to retain counsel of his or her choice;
>
> 2. It impedes the ability of such retained counsel to render effective assistance;
>
> 3. It impairs the relationship of confidence and confidentiality between an accused and his or her counsel;
>
> 4. It allows the government to manipulate the roster of counsel, or to disqualify counsel by seeking to compel testimony by the lawyer against the client;

> 5. It discourages or disallows competent attorneys from agreeing to represent clients in criminal cases which involve allegations of forfeiture; and
>
> 6. It diverts the efforts and energies of attorneys from the preparation of the defense of an accused by requiring them to litigate issues related to their attorney-client relationship.
>
> If the forfeiture practice continues unabated and becomes a widely accepted prosecutorial practice, the resulting effects recited above will erode the elements that assure fundamental fairness and balance in our criminal justice system. It is the ABA Criminal Justice Section's concern that these elements continue to be an integral part of our system of justice that leads to this resolution's adoption.

Following favorable action by the ABA Board of Governors, the House of Delegates passed, without opposition, the following Resolution:

RECOMMENDATION

> BE IT RESOLVED, That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect illegal activity of a client.[14]

The concerns expressed by the American Bar Association have been echoed by several United States District Courts which have considered this issue. United States v. Ianniello, ____ F.Supp. ____ (S.D.N.Y. 9/3/85); United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F.Supp. 1332 (D.Colo. 1985). In Ianniello, Chief Judge Motley reviewed the legislative history of the Comprehensive Forfeiture Act of 1984 (P.L. 98-473, Title II)[15] and concluded:

> Accordingly, it is evident that bona fide attorneys' fees paid to defense counsel who serve the defendants' needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture.

Consistent with the recommendation of the ABA, however, Chief Judge Motley recognized:

> This is not to say that monies paid to or assets transferred to counsel may never be subject to forfeiture. Where property has been transferred to an attorney as part of a sham or fraudulent transaction, or where counsel is merely acting as a nominee for defendant, such property may be subject to forfeiture.

Because of the government's interpretation of present forfeiture provisions, passage of the proposed new forfeiture provisions threatens to extend an already serious constitutional crisis to all federal and state felony prosecutions.

Thus, NACDL not only opposes these provisions, but requests that this Committee seriously consider drafting legislation that would embrace the position of the American Bar Association and the above-cited cases, and ensure to each accused the right to retain ethical counsel of his or her choice. Such a provision could provide:

> Nothing in this Act is intended to interfere with the right of an accused to retain counsel of his or her choice. This Section shall not prohibit the payment to, and the receipt of, a legal fee by an attorney for representation of an accused, unless the attorney has engaged in criminal conduct or has accepted the fee as a fraud or sham or to protect or further the illegal activity of another person.

B. The Crime of Facilitation

Section 7 of the Administration's bill creates a new crime of facilitation by adding an additional subsection to 18 U.S.C. §2, the aiding and abetting statute, which reads:

> (c) Whoever knowingly facilitates the commission by another person of an offense against the United States by providing assistance that in fact is substantial is punishable as a principal.

The NACDL strongly opposes the creation of this new offense on several grounds. First, as Associate Deputy Attorney General Stephens acknowleged in his July 24, 1985, testimony before the Subcommittee on Crime of the House Committee of the Judiciary, this proposal would create a statute of general applicability,

which would not be limited to money laundering violations. Second, while we agree that prosecution is unquestionably warranted in the hypothetical situation advanced by Mr. Stephens to justify this broad new statute - the person who, for a fee, took currency that he knew was derived from a drug sale and exchanged it for cashier's checks to return to the drug dealer, although he took no part in the drug sale and was indifferent as to the source of the money - such a case can be prosecuted easily and successfully under current conspiracy or aiding and abetting laws. See United States v. Lignarolo, fn. 4. Third, to the extent that the proposal is designed to inflict criminal liability upon conduct that does not rise to the level of the purposeful assistance required in the aiding and abetting statute, it is a dangerous departure from well-established concepts of both legislation and case law.[16/] Clearly, there is no basis for such a law, and the NACDL urges this Committee to reject it.

C. The Offense of Receiving the Proceeds of a Crime

Section 8 of the Administration's bill creates another new federal offense (proposed 18 U.S.C. §2322) which would prohibit the receipt, possession, concealment or disposition of any money or other property "which has been obtained in connection with a violation of any" federal felony, and would also prohibit bringing or transferring into the United States any money or other property which has been obtained in connection with any foreign drug felony, if the person commits those acts "knowing or believing the same to be money or property which has been obtained in violation of law."

It is ironic that, in proposing the "reckless disregard" standard of intent for the laundering of monetary instruments, the administration rejected a "reason to know" standard, concluding that it was not suitable for subjecting a person to either the serious criminal or civil sanctions in that Section. Nevertheless, the Administration now proposes the creation of a new offense of general applicability which would allow conviction based upon the impossibly subjective test of the "belief" of an accused,

a standard we regard as more fraught with problems than that already rejected by the Administration.

Aside from the obvious difficulties in determining what constitutes proof beyond a reasonable doubt of a defendant's belief, the very concepts of this proposal undermine time honored traditions of criminal law and constitutional considerations of fundamental fairness.

D. Expansion of Travel Act, RICO and Wiretap Authority

We have already noted that the expansive definition given to the offense of Laundering of Monetary Instruments in S. 1335 would allow its use in almost any circumstance involving the exchange of funds before, during or after the commission of any federal or state criminal offense. Section 6(a) and (b) of the Adminstration's bill is a further attempt to broaden the government's prosecutive powers by making the offense of laundering of monetary instruments a predicate offense for a RICO prosecution, and by including both the laundering of monetary instruments and indictable violations of the Bank Secrecy Act (also greatly expanded in this legislation) as "unlawful activities" under the Travel Act. Because of our objections to the overbreadth of the Administration's money laundering offense, we also oppose its inclusion as a basis for RICO or Travel Act prosecutions.

For the same reason, we oppose the provisions in Section 6(c) of the bill which, in our view, would grant unprecedented authority to law enforcement officers to conduct electronic surveillance. Title III, as it now exists, represents a careful balance of law enforcement necessity, individual privacy, and judicial oversight. There is no reason to alter this delicate constitutional accommodation.

E. Rule 17(c) Amendment

S. 1335 further proposes an amendment to existing Rule 17(c) of the Federal Rules of Criminal Procedure which would permit district courts to issue gag orders barring any person who received a subpoena from disclosing the existence of the subpoena for an unspecified period of time. This provision is activated

only upon motion of an attorney for the government. The rule proposal offers specific guidance to the court in entering a non-disclosure order:

> The court shall enter such an order if it determines that (1) there is reason to believe that the books, records, documents or other objects designated in the subpoena are relevant to a legitimate law enforcement proceeding; and (2) there is reason to believe that notification of the existence of the subpoena will result in: (A) endangering the life or physical safety of any individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

This proposal suffers from several serious defects. First, this authority is in no way limited to money laundering investigations. It is, indeed, an expansive provision which could be called into use in any case upon government motion. Second, a trial court has no discretion in deciding whether to issue a non-disclosure order once the specified findings have been made. The provision is mandatory, and deprives the court of the ability to deal with potential problems in ways less intrusive than a blanket gag order.

Third, although Mr. Stephens suggested to the House Subcommittee on Crime that this provision is intended to prevent disclosures by third parties, "such as banks," the provision is universally applicable to any person receiving a subpoena, including lawyers, family members and tangential targets of the investigation. Curiously, an order entered pursuant to this provision would disable the person subpoenaed from discussing the subpoena with legal counsel. Fourth, although arguably designed to foster grand jury secrecy, the amendment is not so limited, and is applicable to trial subpoenas as well. Grand jury matters are already subject to strict rules of secrecy,[17/] so it is doubtful that further measures are necessary.

Finally, we submit that the standard by which a non-disclosure order is requested and issued is not sufficiently rigorous to protect against potential abuse. The issuance of a

non-disclosure order does not even approach the requirements for non-disclosure in connection with a Title III intercept order.[18] Even in the case of a wiretap, which itself is limited to a statutory 30 days,[19] disclosure must be made "within a reasonable time but not later than ninety days after the filing of [a wiretap] application..."[20] An extension of this non-disclosure can only occur upon a showing of good cause.[21] In such a situation, moreover, the judge has been given the most thorough written statement of probable cause, necessity, and exhaustion of traditional investigative methods before a wiretap or a non-disclosure order issues. Any attempt to limit the availability of communication and information by amendment to Rule 17(c), if needed at all, should follow the same requirements as those contained within Title III.

F. Provision for Civil Penalty

Section 1956(b) of S. 1335 purports to make persons who violate the statute liable, in addition to the substantial criminal penalties, for a civil penalty of not more than the greater of the value of the funds or monetary instrument or instruments involved in the transaction or $10,000.

The placement of this provision within the text of a criminal statute that carries substantial penalties raises serious due process and fundamental fairness concerns. It is not clear, for example, whether such a civil penalty can be imposed upon a person in the absence of, or prior to, a conviction beyond a reasonable doubt of the criminal charges. Because the provision is set forth in a separate subsection of the bill rather than as part of the penalty in subsection (a), it might be interpreted to allow the commencement of civil proceedings on a standard of proof less than beyond a reasonable doubt, and without the right to a trial by jury. Regardless of its interpretation as a civil penalty, the provision clearly attempts to penalize unlawful or illegal conduct. In the view of NACDL, these ambiguities militate against its inclusion in such a criminal statute.

VII.

COMMENTS ON H.R. 1474

Several bills relating to the control of money laundering have been introduced in the House of Representatives, and we respectfully direct the attention of this Committee to one of the Bills, H.R. 1474, which was introduced on March 7, 1985, by Rep. Hughes of New Jersey.

H.R. 1474, the Money Laundering Control Act of 1985, contains none of the constitutional, statutory or evidentiary problems that have caused such great concern on the part of the NACDL regarding S. 1335, the Administration's bill.

Section 2, which sets forth the new money laundering offense, is concise, straightforward and not subject to misinterpretation. Moreover, because the definition of the term "financial transaction" (proposed 18 U.S.C. §1956(d)(1)) is limited to the deposit, withdrawal, transfer or exchange of funds and monetary instruments by, through, or to a financial institution, it does not suffer the hazards of overbreadth which has so concerned us in the Administration's proposed legislation.

We do suggest that, with respect to the language of H.R. 1474, the Committee give consideration to clarifying the standard of intent by limiting liability to those who act with intent to distribute the proceeds of unlawful activity or who promote or facilitate the promotion of unlawful activity.

Also, while the statutory construction of the money laundering offense does not appear to infringe upon the Sixth Amendment right of an accused to retain counsel of his or her choice, we believe the constitutional implications are sufficiently important to require clear language that would guard against potential abuses.[22/]

Because H.R. 1474 better balances the need for effective law enforcement against the rights of individuals, the NACDL believes it deserves the serious study and consideration of this Committee.

VIII.

CONCLUSION

Mr. Chairman, the National Association of Criminal Defense Lawyers is grateful for the opportunity to appear before this Committee and to share with you our concerns and recommendations on these issues of great importance to the nation. We offer our continued support, cooperation and assistance as you and the distinguished members of your Committee continue to discharge your solemn responsibilities to the citizens of the United States.

This concludes my prepared statement and I will be happy to answer any questions at this time.

FOOTNOTES

1/ The study recognized that the "overwhelming majority" of criminal practitioners are honest, ethical and law abiding individuals who discharge their professional responsibilities in the highest traditions of our democratic system of justice, and who exemplify the motto of the NACDL: "Liberty's Last Champion". See "Materials on Ethical Issues for Lawyers Involved With Organized Crime Cases", p. 3 (staff study prepared for a lawyer-ethics symposium sponsored by the President's Commission on Organized Crime).

2/ See Monograph, Investigation and Prosecution of Illegal Money Laundering, Narcotics and Dangerous Drugs Section, Criminal Division, United States Department of Justice, Chapter 5, pp. 100-101.

3/ See Testimony of the Honorable John M. Walker, Jr., Assistant Secretary (Enforcement and Operations), U.S. Department of the Treasury, before the Subcommittee on Crime of the House Committee on the Judiciary, April 16, 1985. See also Interim Report to the President and the Attorney General, THE CASH CONNECTION: Organized Crime, Financial Institutions, and Money Laundering, President's Commission on Organized Crime (October 1984), pp. 26-27.

4/ Most recently, the Eleventh Circuit Court of Appeals, in United States v. Lignarolo, 770 F.2d 971 (11th Cir. 1985), affirmed convictions under the Travel Act, 18 U.S.C. §1952(a)(1), of two defendants charged with "laundering" the cash receipts of drug traffickers. The Court noted that such activities also violate 21 U.S.C. §846, as conspiracies to aid and abet the distribution of controlled substances. Id. at 978; see United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 154 and ___ U.S. ___, 105 S.Ct. 155 (1984).

5/ See Interim Report to the President and the Attorney General, THE CASH CONNECTION: Organized Crime, Financial Institutions, and Money Laundering, President's Commission on Organized Crime, pp. 67 et seq. (October 1984).

6/ See statement of Senator Thurmond, Congressional Record - Senate, p. S 8592 (June 20, 1985).

7/ See e.g. United States v. Lignarolo, supra at 978.

8/ It is not constitutionally improper that a party to a business transaction "be required to open his eyes to the objective realities of the [transaction]." Casbah, Inc. v. Thone, 651 F.2d 551, 561 (8th Cir. 1981). The proposal before the Committee does much more than that; it imposes a standard which approaches strict liability once there is cause to suspect that a person is involved in illegal activities.

9/ Even in instances involving civil forfeitures, the standard applicable is "a reasonable ground for belief of guilt", a showing much greater than an awareness or suspicion. United States v. One 1979 Porsche Coupe, 701 F.2d 1424, 1426 (11th Cir. 1983). See also 1978 U.S. Code Cong. & Ad. News 9518, 9522-9523 (discussing legislative history of 21 U.S.C. §881(a)(6)). This Committee must be aware that this penal provision is capable of being violated on knowledge much less than that required in forfeitures.

10/ 18 U.S.C. §33, proscribing the destruction of motor vehicles or motor vehicle facilities, applies to situations where the accused acts to disable substantially a commercial vehicle conveying passengers, knowing the likelihood of injury to passengers. §1365 involves willful damage to consumer products, to avoid another Tylenol tampering case. §1861 applies to willful deception of prospective purchasers of public lands.

11/ S. 1335 also creates two additional new offenses, "Facilitation" (Section 7 of the Bill) and "Receiving the Proceeds of a Crime" (Section 8 of the Bill). We will address these proposed new offenses in greater detail below, but we note here the applicability of our Sixth Amendment concerns to them.

12/ The government already has taken this position in several cases in which it has sought forfeiture of attorneys' fees. See our discussion of forfeiture provisions, infra §VI A.

13/ See 18 U.S.C. §1963 (RICO); 21 U.S.C. §853 (drug offenses); 21 U.S.C. §881 (civil forfeiture for drug offenses); 31 U.S.C. §5317(b) (civil forfeiture for illegal transportation of currency and monetary instruments).

14/ For the Committee's further information, we have attached a copy of the full Report transmitted to the ABA House of Delegates by the Criminal Justice Section.

15/ See S. Rep. 98-225, P.L. 98-473 at 209 n. 47; H.R. Rep. 98-845 at 19 n. 1.

16/ Courts have recognized over the years that knowledge of the commission of a crime, coupled with association with the criminal, is not a sufficient basis for a criminal conviction. E.g., United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980). The Administration's proposal on facilitation liability represents a potential eradication of this well-regarded legal principle.

17/ Rule 6(e) of the Federal Rules of Criminal Procedure governs grand jury secrecy and improper disclosures. Even in a grand jury context, however, a witness is not governed by the rule of secrecy. E.g., Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re Investigation before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976). There can be no valid reason to impose more stringent secrecy provisions in a trial setting than in grand jury matters.

18/ Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is codified in 18 U.S.C. §§2510-20.

19/ 18 U.S.C. §2518(5).

20/ 18 U.S.C. §2518(8)(d).

21/ Id.

22/ See p. 21, supra.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect illegal activity of a client.

REPORT

The attempt by certain United States Attorneys' Offices to bring about the forfeiture of attorneys' fees pursuant to the recently enacted Comprehensive Crime Control Act of 1984 raises fundamental questions striking at the heart of our adversary system. Ultimately, forfeiture of attorneys' fees, if successful, will take the "adversary" out of the adversary process. Policies central to the adversary system are threatened by the practice of forfeiting attorneys' fees.

This Report provides a brief discussion of the new law, an explanation of why the Recommendation is critical, and a review of the recent cases dealing with this subject.

FORFEITURE AMENDMENTS UNDER THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

The forfeiture amendments contained in the Comprehensive Crime Control Act of 1984 (signed into law 10/12/84) were passed for the purpose of increasing the government's powers in forfeiture actions qud to eliminate the ambiguities which existed in prior forfeiture law concerning in personam forfeiture. Through these amendments, the forfeiture provisions of the RICO statute were changed and a new forfeiture section was added to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq., which applies to all felony drug offenses under the Act, including Continuing Criminal Enterprise (21 U.S.C. §848). The amended RICO forfeiture provisions and the new drug forfeiture sections are virtually identical. The primary purpose of the new forfeiture legislation was to curtail the ability of a defendant to transfer potentially forfeitable assets before conviction.

The new forfeiture provisionr provide that forfeiture vests title in the United States on the commission of the act giving rise to forfeiture. Any subsequent transfer by the defendant to some other person, may be the subject of a special verdict of forfeiture. (See, e.g. 21 U.S.C. §853(c)).

The transferee is entitled to a post-verdict judicial hearing at which time the transferee may establish that he or she has made a bona fide purchase for value and has a superior property interest in the assets subject to forfeiture. The transferee must establish that at the time of the purchase he or she was "reasonably without cause to believe that the property was subject to forfeiture." In addition the Act provides that the government may obtain pre and post-indictment orders prohibiting the transfer of assets by defendants to third parties.

The issues surrounding potential forfeiture of attorneys' fees have been raised in various settings. In Rogers, discussed at length below, the government sought a post-indictment restraining order prohibiting any transfer of the defendant's assets, including payments by the defendants to their attorneys.

This is the only reported decision squarely on point. In Payden and Simel, discussed at length below, the government sought to compel the defense attorney, post-indictment, by a grand jury subpoena, to disclose fee and fee source information. This information would be used as additional evidence of "substantial income," an element of the "continuing criminal enterprise" count, against the defendant, and as evidence relevant to the special verdict of forfeiture. In Sheehan and Groh, the government requested forfeiture of the attorney's fees in the indictment and issued trial subpoenas to the defense lawyers for fee and fee source information. (The trial subpoenas have now been withdrawn.)

SYNOPSIS OF THE IMPACT THAT ATTORNEY FEE FORFEITURE WILL HAVE ON THE CRIMINAL JUSTICE SYSTEM

Forfeiture of fees paid to lawyers who defend persons accused of crimes will have a dramatic impact on the criminal justice system as we now know it. It would mean that the government possesses the capability to control the representation of an accused in complex criminal cases in the following ways:

(1) By forcing withdrawal or disqualification of the accused's defense lawyer of choice by a number of means: e.g., non-payment of fees, disruption of the attorney-client relationship and creating a conflict by calling the defense lawyer as a witness.

(2) By forcing the accused to have court-appointed counsel, thus increasing the government's tactical advantage by supervising and limiting the resources of each defendant's defense.

(3) By forcing talented lawyers to refrain from entry into the criminal defense arena because:

a) they may never be compensated for their services; and/or

b) they will be compelled to act in violation of professional ethical codes such as the Model Rules of Professional Conduct (See, Rule 1.5(d)(2)) and the Model Code of Professional Responsibility (See, DR2-106(C)) by accepting a contingent fee arrangement in a criminal case.

If fees paid for services, which are legitimately earned in the defense of the accused, are forfeited, then accepted notions of effective assistance of counsel, counsel of choice, and a balanced adversary system will have been turned on their respective heads. Defense lawyers' testimony will incriminate their clients on the very matter for which their services were sought. The right to

counsel will be empty because it will depend upon what the government is willing to provide for a particular defendant. The right to counsel of choice will be hollow because defense lawyers will be viewed as fungible goods. The confidential relationship between lawyer and client will be vulnerable to the whim of the government subpoena. Accused persons will be deprived of access to the most talented, experienced lawyers of the criminal defense bar because the government will force their withdrawal.

Whether the legal arguments advanced by defense lawyers result in the persuasion of courts (as was the case in Rogers, infra, but not Payden, infra), remains to be seen. If permitted, forfeiture of attorney fees will have the impact just discussed. The practical realities engendered by the forfeiture of attorneys' fees, not constitutional considerations, will cause these changes to occur; and as such, forfeiture of attorneys' fees for services legitimately rendered represents a policy detrimental to our system. This policy should be opposed regardless of agreement with the specific legal arguments advanced to oppose this practice.

With these thoughts in mind, below is a summary of the arguments opposing the forfeiture of attorneys' fees:*

1. The legislative history of the amendments to the Comprehensive Crime Control Act of 1984 supports the principle that a defendant's transfer of assets to a third person should be voided only when the transfer constitutes an artifice or sham whose purpose is to avoid forfeiture. Fees paid to an attorney who legitimately earned them by providing legal services to the defendant do not constitute an artifice or a sham transaction.

2. The legislative history indicates that the amendments to the Comprehensive Crime Control Act of 1984 dealing with forfeiture were not designed to interfere with the accused's right to effective assistance of counsel. Whenever possible courts should avoid an interpretation which renders a statute unconstitutional. Permitting the forfeiture of fees paid to an attorney which are not part of a sham transaction to avoid forfeitures impinges upon the accused's right to effective assistance of counsel in the following ways:

a) The defendant's lawyer of choice may be forced to withdraw or be disqualified because of deliberate acts of the government.

b) The forced revelation of any confidential communication between the lawyer and the client shatters the attorney-client relationship.

c) The quality of defense may suffer because the lawyer is not paid.

d) The defense attorney will be forced to enter into a prohibited and unethical contingent fee agreement to represent the accused.

e) The defense lawyer must devote substantial time and energy to battle the government on this issue while his/her time and resources are needed to prepare the defense of the accused.

Therefore, to avoid these constitutional problems, attorneys' fees, not part of a sham transaction, should not be forfeitable under the Act.

3. Forfeiting attorneys' fees undermines the balance of the adversary process and violates due process of law in the following ways:

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* Nota Bene: These same arguments are expanded upon and articulated far more eloquently (than is presented by this summary) in Rogers, infra.

a) It permits the government to pick and choose counsel for the accused.

b) It permits the government to limit the resources and to supervise the defense of the accused.

c) It gives the government an enormous tactical advantage over the accused by its ability to manipulate the defendant's lawyer through limiting the resources available to the defense.

4. A violation of the equal protection clause occurs when forfeiture of funds paid by the defendant are sought in the indictment and only attorneys' fees are specifically singled out for forfeiture, while other funds paid by defendant to third parties are not, as in the Sheehan and Groh case infra.

RECENT RELEVANT CASES INVOLVING FORFEITURE OF ATTORNEYS' FEES

United States v. Rogers
No. 84-CR-337, 36 Crim. L. Rep. (BNA) 2409
(D. Colo. Feb. 22, 1985.)

The case of United States v. Rogers involved a RICO indictment alleging, inter alia, forfeiture under the Comprehensive Crime Control Act of 1984 where the government sought to restrain all transfers of defendants' assets. Defense attorneys moved to exclude attorneys' fees and costs from the forfeiture sought by the government in the indictment.

The Court discussed what transferred assets are subject to forfeiture under the Comprehensive Crime Control Act of 1984. After referring to the new language of the Act, Section 1963(c)(RICO statute) and the legislative history of subsection (c), it held that an order of forfeiture reaches property of the defendant only where the transfer is an artifice or sham to avoid forfeiture. The Court reasoned that the Act imposes a constructive trust which nullifies transfers by a defendant designed as an artifice or sham.

An attorney who receives funds in return for services legitimately rendered operates at arm's length with his client, and not as part of an artifice or sham to avoid forfeiture.

> Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered. Congress did not intend to include in those forfeitable items the compensation already paid for goods and services legitimately provided. This does not, however, mean that assets transferred to a lawyer as part of a sham will not be subject to forfeiture. (Emphasis supplied)(Slip. Op. at 22)

Requiring an attorney to testify at a post-conviction hearing on the forfeitability of his fees will result in disclosures by the attorney going far beyond the traditional exception to the attorney-client privilege because the fee information is not privileged unless its disclosure would implicate the client in a crime. Such a forced disclosure will chill communications between client and lawyer, impinging upon the right to counsel.

Permitting the government to force counsel on the accused (by court-appointment) and manipulate, if they so choose, which defense lawyer must withdraw, upsets the delicate tri-partite balance of the adversary system:

> The impact on the adversary process occasioned by the ability of the government to seize attorney fees is of even greater concern. The retort to the claim of denial of counsel of one's choice, that appointed counsel is available, pays no more than lip service to due process and the right to counsel. This view ignores the exigencies of RICO cases....The government brings to bear significant resources to prosecute these cases. Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process.
>
> Central to due process is the "balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). The interpretation of the Comprehensive Forfeiture Act of 1984 suggested by the government would undermine the very principles underlying the adversary system. The government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries. While I presume that most prosecutors act in good faith, I cannot ignore the potential for prosecutorial manipulation of a grand jury which I saw in United States v. Kilpatrick, 594 F.Supp. 1324 (1984) and United States v. Anderson, 577 F. Supp. 223 (D. Wyo. 1983). Due process cannot tolerate even the opportunity for such abuse of the adversary system. (Slip Op. at 24-25.)

Reasoning that the Act must be interpreted to avoid a ruling that it violates the accused's right to counsel, the Court granted the defendants' motions to exclude attorneys' fees and costs from forfeiture.

Simels, Payden v. United States of America
No. M-11-188 (DNE), 36 Crim. L. Rep (BNA) 2003
(S.D.N.Y. March 11, 1985)(adoption of theory that defense lawyers are fungible goods). Appeal to the Second Circuit, Oral Argument set for April 26, 1985.

The Simels case involved a "continuing criminal enterprise" indictment and a trial subpoena duces tecum issued to the lawyer, Simels, for fee and fee source information. The trial subpoena was withdrawn because a sitting grand jury issued a subpoena duces tecum to Simels requesting the same fee and fee source information. The court upheld the grand jury subpoena of Simels and summarized its opinion by stating "the defendant has and will continue to receive the effective assistance of counsel, whether represented by Simels or another attorney." In the process of reaching this conclusion the court made the following statements:

(a) The disclosure of the fee arrangement between Simels and Payden is not protected by the attorney-client privilege. The fact that disclosure of fee information may be incriminating, does not deny the defendant any Sixth Amendment rights. Defense counsel's ability to formulate defense strategy and prepare for trial is not impaired by divulging his fee arrangement. The destruction of the trust between the attorney and client is a "makeweight" argument.

(b) The time and resources required by counsel to respond to the subpoena will not effectively prevent him from acting as counsel to Payden. The lawyer will not be discouraged from conducting a proper defense because of the threat to forfeit his fees because the professional ethics require zealous advocacy despite the risk that he will not be paid. If either the lawyer or the client feels that the lawyer "can no longer provide effective representation in this case, the court will ensure that Payden is represented by counsel who will provide effective representation of Payden's interests." (Slip Op. at 15-18)

(c) Should it be necessary for the attorney to testify at the trial (because his testimony concerning fee information is relevant to the "substantial income" charge under Section 848(a) and the forfeiture sought by the government in the indictment) the lawyer will have to be disqualified. Such disqualification, however, will not violate the defendant's Sixth Amendment rights to assistance of counsel. The court may order a limited disqualification but permit "Simels to continue to assist with Payden's defense, but not appear and consult in front of the jury." (Slip Op. at 24)

(d) With respect to the defendant's claim of abuse of grand jury process violating his Fifth Amendment due process rights because the government is using the grand jury subpoena to his lawyer as a discovery tool to accumulate evidence for the pending CCE trial, the court holds that the government is entitled to investigate the matter fully, provided that there is no harassment or bad faith shown by the subpoena of Simel.

It remains to be seen whether this case will withstand the scrutiny of appeal to the Second Circuit. A number of recent appellate cases articulate potential grounds that could result in a failure to sustain the district court decision. One of these grounds is the failure of the Court to adhere to the basic thrust of In Re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984). In this case five defense lawyers were served with Federal grand jury subpoenas requesting fee and fee source information shortly before they were about to start a state court trial involving the same clients. The First Circuit upheld the lower court's decision to quash the subpoenas:

> In this case the court was presented with a subpoena whose enforcement at the particular moment seemed to it likely to entail consequences more serious than even severe inconveniences occasioned by irrelevant or overboard requests for records. To call defense attorneys before the grand jury, in connection with an investigation of the same activities for which their clients were standing trial in state court, while the attorneys were preparing for this major felony trial, could be taken as veiled threat, with such potential for harm to the state defendants and the defense bar as to require the government to show with some particularity why the grand jury's investigation required the execution of the subpoenas at this particularly sensitive moment. Id. at 18.

Another possible basis for reversal can be found in the recent Second Circuit case of Roe v. United States, No. 84-6319 (2nd Cir. April 1, 1985). In a two-to-one decision, the Court held that a grand jury subpoena to the target's attorney, who had represented the target for some eighteen years, should be quashed unless the government shows that the information it seeks can be obtained only from the defense lawyer. The court based this decision upon the protection of the attorney-client relationship:

> First, the unbridled use of the subpoena would potentially allow the Government, in this and future cases, to decide unilaterally that an attorney will not represent his client. Such a power of disqualification can undermine and debilitate our legal system by subjecting the criminal defense bar to the subservience of a governmental agent. The unrestricted exercise of this power without adequate justification does not strike us as necessary or indispensable in an adversary system of criminal justice, particularly when we consider the significance of the attorney-client relationship and the need for an independent bar. Second, as noted earlier, the right to have counsel of one's choosing in the defense of a criminal charge is of constitutional dimensions. Thus, any potential infringement of this right must only be as a last resort. ... Requiring adequate justification will prevent the arbitrary dismissal of an attorney, and still protect the grand jury's access to information if the Government can demonstrate that the attorney's testimony is not only relevant but that there is a need for it that cannot reasonably be met in some other fashion. (Slip Op. pp. 16-17)

Sheehan and Groh
Case No. CRF No. 84-198 REC (E.D. Cal. argued April 8, 1985)

In this case of first impression, the government in a "continuing criminal enterprise" forfeiture case, included in the indictment, a request for the forfeiture of attorneys' fees:

> Any and all fees in the form of currency, real and/or personal property or other thing of value paid or transferred after November 14, 1984 (the date of the arrest) by or on behalf of the defendant and to the attorney(s) representing him or a co-defendant, or as a result of this matter, which currency, real and/or personal property or other thing of value is owned or possessed by defendant prior to the transfer to said attorney(s).

Before indictment, defense attorney Neal Sonnett received a "Notice Letter" indicating that the government sought forfeiture of any attorney's fees received by him and that any effort to dispose of his clients' fees would expose Sonnett to criminal prosecution for obstruction of justice. Counsel for co-defendant Groh, Albert Kreiger, received a similar letter. After indictment, both Sonnett and Kreiger received Rule 17(c) subpoenas seeking fee records and fee source information of their clients. The subpoenas have now been withdrawn.

The case has been briefed and argued, but no decision has been announced.

CONCLUSION AND SUMMARY

The foregoing report, and the cases cited in it, provide ample illustration of the dramatic detrimental impact that forfeiture of

attorneys' fees is having on our system of criminal justice. It is worthwhile summarizing these effects as a means of concentrating attention on the magnitude and breath of their impact.

Accordingly, the following list recites the more serious ramifications of the attorney fee forfeiture practice:

1. It denies an accused the right, under the Sixth Amendment, to retain counsel of his or her choice;

2. It impedes the ability of such retained counsel to render effective assistance;

3. It impairs the relationship of confidence and confidentiality between an accused and his or her counsel;

4. It allows the government to manipulate the roster of counsel, or to disqualify counsel by seeking to compel testimony by the lawyer against the client;

5. It discourages or disallows competent attorneys from agreeing to represent clients in criminal cases which involve allegations of forfeiture; and

6. It diverts the efforts and energies of attorneys from the preparation of the defense of an accused by requiring them to litigate issues related to their attorney-client relationship.

If the forfeiture practice continues unabated and becomes a widely accepted prosecutorial practice, the resulting effects recited above will erode the elements that assure fundamental fairness and balance in our criminal justice system. It is the ABA Criminal Justice Section's concern that these elements continue to be an integral part of our system of justice that leads to this resolution's adoption.

Respectfully submitted,

Paul T. Smith, Chairperson
Criminal Justice Section

General Information Form

To Be Appended to Reports with Recommendations

No._____
(Leave Blank)

Submitting Entity Criminal Justice Section

Submitted By Paul T. Smith, Section Chairperson

1. Summary of Recommendation(s).

It is recommended that the American Bar Association disapprove of using the forfeiture provisions and subpoena provisions of the "Comprehensive Crime Control Act of 1984" against attorneys actively representing defendants, unless there is reasonable grounds to believe the attorney is engaged in criminal activity or has accepted a fee to protect illegal activity of a client.

2. Approval by Submitting Entity.

The Criminal Justice Section Council approved the recommendation at its May 11-12, 1985 meeting in San Francisco, California.

3. Background. (Previous submission to the House or relevant Association position.)

This recommendation has not been submitted to the House of Delegates previously. Neither is there any existing ABA policy on this specific issue.

4. Need for Action at This Meeting.

Since the enactment of the "Comprehensive Crime Control Act of 1984" in October, 1984, United States Attorneys in certain federal districts have been using its provisions to seek forfeiture of fees paid to lawyers by clients who are accused of racketeering and drug offenses. Attorneys have also been called before federal grand juries to testify concerning activities of clients who they represent in these matters. Both these practices have hampered defendants who are accused of federal racketeering and offenses in their efforts to retain competent counsel of their choice. It is important that the ABA take an immediate position opposing this tactic before its use proliferates, posing even greater problems for our system of equal justice.

5. Status of Legislation. (If applicable)

No legislation has yet been introduced in the 99th Congress. However, the House Judiciary Committee's Subcommittee on Criminal Justice held general oversight hearings in April 1985 on the subject of "defense attorney harassment by U.S. Attorneys' Offices." Seeking forfeiture of fees and calling attorneys before grand juries on matters in which they represent clients are examples of such harassment.

6. Financial Information. (Estimate of funds required, if any.)

None

7. Conflict of Interest. (If applicable)

N/A

8. Referrals.

Standing Committees

Association Standards for Criminal Justice
Ethics and Professional Responsibility
Law and National Security
Lawyers' Responsibility for Client Protection

Sections and Divisions

Corporation, Banking and Business Law
General Practice
Individual Rights and Responsibilities
Judicial Administration Division
Appellate Judges' Conference
National Conference of Federal Trial Judges
Litigation
Young Lawyers Division

Affiliated Organizations

The Federal Bar Association
National Association of Criminal Defense Lawyers, Inc.
National Legal Aid and Defender Association

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Senator MCCONNELL. Thank you, Mr. Sonnett.

Senator DeConcini.

Senator DECONCINI. I have no questions, Mr. Chairman.

Senator MCCONNELL. I think neither Senator DeConcini nor I have any questions.

Thank you both for coming.

Senator MCCONNELL [presiding]. We will now call on the next panel, consisting of Earl Hadlow, vice president and general counsel of Barnett Banks of Florida, on behalf of the American Bankers Association; Jerry Berman, chief legislative counsel, American Civil Liberties Union, and William W. Nickerson, attorney with Leonard and McGuan, here in Washington, a former Deputy Assistant Secretary of the Treasury.

Mr. Hadlow, are you going to lead off?

STATEMENT OF A PANEL, INCLUDING: EARL B. HADLOW, VICE CHAIRMAN AND GENERAL COUNSEL, BARNETT BANKS OF FLORIDA, JACKSONVILLE, FL, ON BEHALF OF AMERICAN BANKERS ASSOCIATION; WILLIAM W. NICKERSON, ATTORNEY, LEONARD AND McGUAN, WASHINGTON, DC, A FORMER DEPUTY ASSISTANT SECRETARY OF THE TREASURY, AND JERRY BERMAN, CHIEF LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, DC

Mr. HADLOW. Thank you, sir.

I am Earl Hadlow, vice chairman and general counsel of Barnett Banks of Florida, in Jacksonville, FL. I am appearing on behalf of the American Bankers Association.

First of all, let me say that the banking industry is almost entirely in support of the Government's determination to fight and slow down the illicit drug business by a system of strictly monitoring cash transactions. We think that is the tool the Government needs. We understand it, and we support it 100 percent.

It is the primary tool for bringing the illegal drug industry more closely under control, and I think it is working. The days when

people brought laundry bags full of money into banks and stacked them up and laundered that type of cash are over.

I just want to disagree very strongly with the preceding witness, Mr. Harmon, when he said he thinks the banking industry has done a poor job of complying with the Bank Secrecy Act. I think the banking industry has done a monumental job of doing this. It has been a mammoth task.

Essentially we have had to train every person in our bank on the intricacies of this act and tell them that we expect 100 percent compliance with it. It is a career-threatening error in my organization not to comply with this act.

We have had to design computer programs that not only give dual checks on this daily, but give the system the ability to aggregate deposits that come in by "smurfs" in different branches, so at the end of the day we can post them and see if there has been more than $10,000 that has come into several different branches.

The forms themselves are complex and time-consuming. The banking industry has literally spent millions of dollars in complying with this act, and I think we have really put the pressure on the drug laundering business.

What is interesting, is that of all the recently publicized cases where there have been settlements, between the banks and the Department of the Treasury none have involved money laundering. There has been no criminal activity involved in any of those reports. They have all involved a single, widely-misunderstood element in the Bank Secrecy Act, where banks have been trading their own foreign cash back in for American dollars, and they did not do it with another American bank, in which case it would have been an exempt transaction. But those banks that collect foreign money, like border banks in Arizona and Texas, where they get a lot of pesos in—Florida gets a lot of Canadian dollars; all the banks along the Canadian border, they get those dollars in, and when they exchange them with Canadian banks, that transaction is also covered by the Bank Secrecy Act and amendment in 1980, and nobody much in the banking industry picked that up. After the *Bank of Boston* case, banks discovered that that was covered, and everybody went back and did the appropriate filing. And those are the millions of dollars of cases that the Treasury Department has been regularly fining, giving walloping big fines, too, to all of the banks that come forward with this data. There was no crime involved, no money laundering, just the bank. When the money came in, if it came in in amounts over $10,000 we would file a CTR. When we changed it with a Canadian bank, that is when we did not do it

But the banking industry has taken a black eye because of that, and I believe that it has caused the President's Commission to feel that we have not been complying with this, and I think it is totally unfair in the light of what I consider a magnificent effort, at our own cost, to comply with this Bank Secrecy Act and make it work—and I think it is working.

Now, despite all that, we favor the Government's approach now to make the money laundering act itself a crime. We believe that if it is crafted, narrowly enough as the previous speaker said, that it would be a good tool, a workable tool, and the Government needs

it. The banking industry has been taking all of the heat so far if the forms were not filed. But it is absolutely unjustified to put the entire burden on the first line of the banking industry, which is the teller, where the money comes in, to make judgmental questions about whether or not the money came from illegal sources. It is impossible for the teller to have any idea how to do that. What they can do is a mechanical job. If it is in excess of $10,000 in cash, we can surely file a form, and that, we are perfectly willing to do. But to make them make a subjective call on whether it came from an illegal source is something that is totally impossible. The "reckless disregard" standard as proposed in the bill is not aimed at the crook. The crook is guilty; he is willfully doing it. They are not trying to get him. The "reckless disregard" standard is aimed at the banker and other innocent people. And believe me, there are a ton of prosecutors that will go for a bank that has itself been victimized by money launderers if they have a chance to do it.

Just let me give you one example, and then I see I have used up my time.

If a "smurf" comes in and put $5,000 in a bank every day for a number of weeks, under the present law the bank is not required to report that, and it would fall under our standards that are caught by computers and everything, and we would not do that. But if the Government catches that money launderer, he will then find that he has been depositing $5,000 a day in a certain bank for several months, and believe me, a prosecutor will then come against that bank and say the bank was in reckless disregard of those circumstances, taking $5,000 a day of drug money. That is the sort of standard that the banking industry will absolutely get strangled with. We absolutely have to have some protection in a very narrowly drawn bill, and then we are willing to work 100 percent with the Government as we have been doing now.

I conclude by saying I think the Government has all of the rights under the Bank Privacy Act that they need. The Treasury Department already can subpoena. The banks already can turn in people they suspect of a crime—and we regularly do it. I do not know whether previous witnesses say that it does not happen. My bank does it all the time. We tell them that there is a crime suspected involving such-and-such an account, and that is it. And then they take over from there, after we have blown the whistle on the account.

Senator McCONNELL. Thank you, Mr. Hadlow.

[Prepared statement and responses to questions follow:]

STATEMENT

OF

EARL B. HADLOW

on behalf of

THE AMERICAN BANKERS ASSOCIATION

Mr. Chairman and members of the Committee: I am Earl B. Hadlow, Vice Chairman and General Counsel of Barnett Banks of Florida in Jacksonville, and a member of the American Bankers Association Government Relations Council. The combined assets of our members comprise approximately 95 percent of the industry total. Our members range from the smallest to the largest banks, and close to 85 percent of them have assets of less than $100 million. I welcome the opportunity to present ABA's views on S.571, S.572, S.1335, and S.1385.

The changes proposed in the Currency and Foreign Transaction Reporting Act and the Right to Financial Privacy Act are issues in which the American Bankers Association has a vital interest.

Dating back to 1970 prior to the passage of either one of these pieces of legislation, we have appeared before both the House and Congress to voice our concern and our support of the two acts. The ABA understands the challenge that law enforcement officials face in attempting to combat drug trafficking and organized crime. The use of financial institutions as havens for drug money is as abhorent to our members as it is to the public in general. We want to ensure a balance between the legitimate need of law enforcement to have adequate information on activities of criminal elements and the legitimate need to protect the information we have in our institutions from unlimited governmental intrusion.

Perhaps, our feelings were best summed up by Mr. R.L. Wood when he appeared before the House Committee on Ways and Means on July 18, 1975, and I quote:

> "The right of privacy of an individual's financial records...in the absence of a known violation of law by the individual involving his finances...is an integral element of the American concept of political rights of the individuals. These rights have been characterized as being protected under our Constitution and under the common law."

Our Association has long supported customer privacy. In 1940, the General Counsel of the American Bankers Association said:

> A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification. Milohnich v. First National Bank of Miami Springs, 224 So.2d. 759, 761 (1969).

The ABA has a long history of supporting the enforcement of the Currency and Foreign Transactions Reporting Act (CFTR Act). The cooperation of the financial industry with Congress and the law enforcement community became evident in the earliest hearings on what is now known as the CFTR Act, when the former ABA President C.C. Sommer told the House Banking and Currency Committee that:

> This Association and commercial banks generally are deeply interested in the apprehension of criminals and limitation of their activities both in this country and abroad. We too are concerned with the public interest aspect of the bill and desire to do everything in our power to protect that interest. Banks have an obligation to their customers to maintain the privacy of their personal financial affairs except in response to subpoena or other regular legal process.

The Association shares law enforcement's commitment to detecting laundering of proceeds of illegal activities. However, this commitment is founded upon the balance between legitimate societal needs and the preservation of our customers' right to privacy.

This shared commitment demands that we, the industry and Government, continually remind the public of their duties under the current law and clarify the inaccuracies that have surrounded the debate over these proposals.

> The key policy issue is to determine the appropriate balance between the civil liberty interests and the intelligence, law enforcement, or other governmental interests involved. In some circumstances, the law enforcement interest will be great enough to outweigh the civil liberty interest. In other circumstances, the reverse will be the case. Policy, be it judicial, legislative, or administrative, seeks to define the parameters for this balancing process. ("Electronic Surveillance and Civil Liberties," Office of Technology Assessment, Congress of the United States, October 1985, p.12.)

As we focus on the proposed legislation, we should analyze these proposals in the light of two critical questions: 1) should the crime of money laundering be so broadly defined as to include innocent financial transactions?, and 2) does Congress need to amend the Right to Financial Privacy Act?

Senator D'Amato introduced S.571 and S.572 which include many of the recommendations issued in October 1984 by the President's Commission on

Organized Crime. S.572 would make the act of laundering money itself a criminal offense. Anyone who conducts a single or series of transactions involving monetary instruments using a financial institution with the intent to promote, manage, establish, or carry on any unlawful activity would be guilty of the crime of money laundering. Further, anyone who conducts a transaction or series of transactions involving monetary instruments using a financial institution with knowledge or reason to know that such monetary instruments represent income directly or indirectly derived from any unlawful activity would be guilty of money laundering.

Under Senator D'Amato's bills, the Secretary of the Treasury could delegate his "proposed" authority (as proposed in this bill, not currently available to him) to examine relevant data and records of domestic financial institutions, to summon bank officers and employees to produce material relevant to recordkeeping, and to take testimony on any data relevant to any inquiry under the Currency and Foreign Transaction Reporting Act. Civil penalties for violations of the reporting requirements would be raised from $1000 to either the amount of the transaction involved or $10,000.(These increased penalties became law as part of the Comprehensive Crime Control Act of 1984). The penalties for the first offense of the crime of money laundering would be either a fine equal to the greater of $250,000 or twice the value of the monetary instrument involved or up to ten years imprisonment, or both. Penalties for subsequent offenses are dramatically increased. The act of "criminalizing" money laundering removes the differentiation between the illegal use of banking transactions and the legal use of these same transactions.

In light of the current civil and criminal penalties available under the Bank Secrecy Act, the Secretary of the Treasury has effective weapons to combat laundering of proceeds of illegal activities.

Senator DeConcini introduced S.1385 which focuses on what has been considered a major problem associated with currency transaction reporting, the use of exemption lists.

Under the Currency and Foreign Transactions Reporting Act (31 U.S.C. Sections 5311-5322), the Secretary of the Treasury may prescribe or revoke an appropriate exemption from the reporting requirements.

However, financial institutions lack sufficient guidance from the Secretary of the Treasury as to what constitutes full compliance with the exemption requirements. Senator DeConcini's approach would ensure that an institution's exemption list is regularly reviewed by the Treasury. The institution would submit, on a quarterly basis, "a list of customers of the financial institution whose transactions have been exempted." The Secretary would be required to "review and approve or revoke the list of exemptions within 90 days after the date of receipt." If the Secretary fails to notify the financial institution within the time provided, the exemption list would be deemed approved.

This proposal would encourage frequent review of the currency transaction reporting exemption lists. These reviews would guarantee that the lists are used only for their intended purpose: to exclude from the reporting requirements only those customers clearly intended to qualify under the regulations. This approach is similar to the exemption list provisions in H.R.1474 introduced by Mr. Hughes, Chairman of the House Subcommittee on Crime.

S.1385 would make anyone who initiates a transaction with the intent to promote unlawful activity or with knowledge or reason to know that the monetary instruments involved in the transaction are derived from unlawful activity guilty of the new crime of money laundering. The "knowledge or reason to know" standard is well settled in criminal law and according to the President's Commission on Organized Crime "is intended to make clear that either a subjective or an objective standard of intent may be chosen for proof..." Senator DeConcini, like Senator D'Amato, recognizes that there is no apparent need to amend the Right To Financial Privacy Act.

THE ADMINISTRATION PROPOSAL

On June 20, 1985, the Administration had introduced "The Money Laundering and Related Crimes Act of 1985," S.1335, ("the Administration bill") creating among other things a new crime of money laundering. In several ways, the Administration bill resembles S.571 and 572, however, unlike S.571 and S.572, it eliminates most of the current protections accorded customers under the Right to Financial Privacy Act (Financial Privacy Act).

Under the Administration bill, anyone who conducts, causes to be conducted, or attempts to conduct a movement of funds or a transaction which in any way affects interstate or foreign commerce, 1) with the intent to promote, manage, establish, carry on (or facilitate same) any unlawful activity, OR 2) knowing or with a reckless disregard of the fact that such monetary instruments or funds represent proceeds of any unlawful activity ... shall be guilty of money laundering and subject to substantial fines and imprisonment. The term "conduct" includes, but is not limited to initiating, concluding, or participating in initiating, or concluding a transaction. This crime could require tellers to be capable of determining the character of the customer and the origin of funds, regardless of how remote.

The Secretary of the Treasury's authority to examine records, papers, and other data of the financial institution relevant to the reporting requirements of the Bank Secrecy Act would be expanded. The financial institution could be required through a summons to produce such documents and records at any location within 500 miles of the institution's place of business at its own expense. The Financial Privacy Act currently requires the Government to reimburse the financial institution except in cases of voluntary disclosure, discovery procedures, subpoenas issued by an administrative law judge, and in perfecting a security interest. The Secretary could make the report information available to other Federal and state agencies not only upon request, but also when the Secretary believes such information may be relevant to a matter within the jurisdiction of the other agency.

The criminal and civil penalties for violations of the reporting provisions under the Currency and Foreign Transaction Reporting Act increased substantially.

The Administration bill also makes drastic changes to the Financial Privacy Act, such as repealing the protective provisions which require the customer to be notified when his or her financial records have been transferred within the Government; removing the requirement that the records obtained under a Federal grand jury subpoena be returned; and the abandoning of the protection of financial records from the whim and caprice of the Government.

Money Laundering as a Crime

The ABA supports making the laundering of proceeds of illegal activities a crime, provided that, at a minimum, specific criminal elements such as intent and scienter are included in the definition. The crime of money laundering must be drafted with precision so as to exact the most effective, fair result. First, the thrust of any newly defined crime of "money laundering" should be on the individual who initiates or is knowingly involved in a transaction with the intent to promote illegal activity or with knowledge that the transaction represents income derived from illegal activity. This definition would affect customers and employees of financial institutions alike.

In addition, it should be noted that related abuses by financial institutions and their employees will continue to be covered under the civil and criminal penalty provisions found in the Currency and Foreign Transaction Reporting Act. For example, the civil penalties for willfully failing to comply with the currency and transaction reporting requirements include a fine of $10,000 for each violation, for each day the violation continues, and at each office, branch, or place of business at which a violation occurs. Additional civil penalties of up to the amount of the monetary instrument for which the report was required may be imposed on any person not filing a report, or filing a report containing a material omission or misstatement. Each person who willfully violates any of the reporting requirements is also subject to criminal penalties and a fine of up to $250,000 or imprisonment up to five years, or both. If the violations are part of a pattern of illegal activity involving more than $100,000 in a 12-month period, then the criminal penalties are increased to $500,000 or imprisonment for up to five years, or both.

These current civil and criminal penalties coupled with the new crime of money laundering, as it is proposed in Senator DeConcini's bill, should be sufficient to meet legitimate law enforcement needs.

Definitions

"Transaction"

The first of many problems in the Administration's bill is found in the definitions section. The term "transaction" would include, for example,

any purchase, sale, gift or transfer. This could cover payroll checks and purchases of real estate. Such a definition will, in effect, indiscriminately change many legal banking transactions into suspected illegal activities. The definition of "monetary instruments" no longer limits itself to the historical source of laundered funds (e.g., coin and currency). S.1335 would make even personal checks a monetary instrument. S.1335 defines "unlawful activity" to include any state or federal felony. All state felonies involving money would be federalized. Again, this proposal would put state and local laws into the federal government's arsenal.

"Reckless Disregard"

The Administration's definition of money laundering will now cover persons who cannot be shown to have actual knowledge that the monetary instrument received or handled in a transaction is derived from unlawful activity. Rather, anyone who receives or handles monetary instruments in reckless disregard of the direct or indirect source of the funds would be guilty of money laundering.

The standard proposed by the Justice Department has been criticized recently by the Attorney General of California who called "reckless disregard" an unclear standard which will pose compliance difficulties and unnecessarily complicate prosecution of the offense of money laundering. The California legislature has proposed a money laundering statute which is drawn fairly and only covers activity that is engaged in "knowingly."

In a staff memorandum speaking to the standard of reckless disregard prepared for the members of the House Subcommittee on Crime, it was pointed out that:

> Under the reckless disregard state of mind, the government could prosecute any and all employees who receive and cash or deposit a paycheck of a corporation that was guilty of a felony that resulted in a profit to the corporation since their salary is derived directly or indirectly from the proceeds of the crime, e.g., employees of E.F. Hutton, General Electric, etc.

This would be, in our opinion, a clear example of the overbreadth of the crime. Employees of E.F. Hutton, General Electric and the financial institution would all be guilty of money laundering.

The Right to Financial Privacy Act

Under the current Right to Financial Privacy Act, 12 U.S.C. Section 3403, a financial institution, its officers, employees, or agents may notify the government that it has information which may be relevant to a possible violation of any statute or regulation. In addition, the current Financial Privacy Act allows for the examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to the financial institution. These two current sections of the Financial Privacy Act make available all the information that the Government needs to effectively combat money laundering.

The Administration Bill makes dramatic changes to the Financial Privacy Act. S.1335 would amend these current provisions to allow financial institutions to provide financial records to Government agencies if the institution has only a reason to believe in its judgment that they may be relevant to a possible violation of any law, statute, or regulation relating to crimes by or against financial institutions or supervisory agencies. Under the Administration bill, this information may include names and account numbers and other identifying information concerning the "suspected illegal activity." This proposed change not only charges financial institutions with determining possible relevance, but also directly repeals the current provision which prohibits a financial institution from relinquishing the actual financial records or copies thereof to any Government authority except in accordance with the specific protective provisions.

The Right to Financial Privacy Act was enacted to protect customers of financial institutions from unwarranted Government intrusion into their financial records while, at the same time, permitting legitimate law enforcement activity. This protection of individual privacy includes assurances that the customer would be given prior notice of the Government's attempt to gain access to his or her bank records (except under specified circumstances), and that the customer be given the opportunity to contest Government access in court. The Congressional concern over protection of privacy as found in the Financial Privacy Act postdates the Currency and

Foreign Transaction Reporting Act. Congress enacted the Financial Privacy Act in response to U.S. Supreme Court's decision in U.S. v. Miller, 425 U.S. 435 (1976), which held that customers had no legally recognizable expectation of privacy in account records maintained by a bank. Two years prior to the Miller decision, the Supreme Court in The California Bankers Association v. Schultz, 416 U.S. 31(1974), upheld the CFTR Act against arguments that its recordkeeping requirements infringed on constitutionally protected individual privacy.

The Administration's amendments to Section 3413 would give the Government the best of both worlds, that is - the Government could receive the actual financial records with little or no effort. No effort would be needed because bankers would be "deputized" and directed to make prosecutorial determinations on what possible violation of law had occurred and judicial decisions on the relevancy of the "evidence." In the event that the deputized bankers failed to exercise their new prosecutorial and judicial authority and did not relinquish the records, the Government could rely on the supervisory agencies who will also be armed with the same blanket "authority." Because this amendment begins with "Nothing in this title shall apply when a financial institution or supervisory agency ... provides records with reason to believe may be relevant...", the effect would be that all of the protections of the Financial Privacy Act would be lost if a bank or a supervisory agency turned over actual financial records with a mere reason to believe that they may be relevant to a possible violation of any law relating to crimes by or against financial institutions or supervisory agencies. The act of turning over records would get any bank out from under the "burdens of the Financial Privacy Act." Failure to turn over financial records would put the banks at risk of being charged with the crime of money laundering.

Transfer of Records

Under the current Financial Privacy Act (Section 3412) financial records obtained under the Act can be transferred to other agencies when the transferring agency makes a certification in writing that "there is reason to believe that the records are relevant to a legitimate law enforcement

inquiry within the jurisdiction of the receiving agency or department." In addition, the Financial Privacy Act clearly provides that supervisory agencies are free to exchange and disclose examination reports or other information with other supervisory agencies. According to the Financial Privacy Act, the Secretary of the Treasury is a supervisory agency for CFTR Act purposes.

The Administration bill again proposes to relax the "are relevant" requirement to a weaker "may be relevant" standard, once again replacing objectivity with speculation. The amendment states that nothing in the Financial Privacy Act would apply when financial records obtained by an agency or Department of the U.S. are transferred to another agency of department if there is reason to believe that the records may be relevant to a matter within the jurisdiction of the receiving agency or department. We must question the need for the expansion of authority when Treasury as a supervisory agency is already permitted to exchange examination reports or other information with other supervisory agencies. Further, the Financial Privacy Act does not prohibit the disclosure of financial records or information to any supervisory agency. Once again, the Financial Privacy Act would not apply if the transfer of records was believed to may have been relevant to "a matter" within the jurisdiction of the receiving agency or department. Prudence demands that we define just what "a matter" within the jurisdiction...includes. Notwithstanding the gross deviation from the principles behind the Financial Privacy Act, this amendment should, at the very least, address itself to legitimate law enforcement activity rather than a mere "matter."

Good Faith Defense

Under current law, a financial institution can notify the Government that the institution has information which may be relevant to a possible violation of any statute or regulation. In addition, a financial institution that discloses financial records "in good faith reliance upon a certificate of compliance with the Financial Privacy Act by any government authority" will be protected from liability for improper disclosure.

The legislative history of the Financial Privacy Act emphasizes that "if a bank grants access to records based only on an oral request ... it

would not be acting in good faith." (See H.R. Rep. No.13831, 95th Cong., 2nd Session 218 (1978)). The good-faith defense, currently available, is expanded under this Administration bill to include the defense of simply having a good-faith "belief" that such records may be relevant to a possible violation. What protections are left to the customer if financial institutions are given this ambiguous defense?

Customer Notification

Under Section 3402 of the Financial Privacy Act, the government may have access to or obtain copies of the financial records of a customer 1) if the customer authorizes such access; 2) by means of an administrative subpoena or summons; 3) in response to a search warrant pursuant to the Federal "Rules of Criminal Procedure"; 4) in response to a judicial subpoena; 5) or in response to a formal written request to the financial institution. The Financial Privacy Act generally requires the government to give notice to the customer of an order or request for records. However, in order to assist law enforcement efforts, customer notification can be delayed under Section 3409 of the Financial Privacy Act (12 U.S.C. 3409). Customer notification can be delayed when:

* customer records are disclosed pursuant to customer authorization;
* a financial institution is served with an administrative subpoena and summons;
* records are disclosed pursuant to a search warrant;
* a financial institution has received a formal written request; or
* records pertaining to customer financial transactions have been transferred from one government agency to another.

A delay order may be granted by an appropriate court if the presiding judge or magistrate finds that:

* the investigation conducted is within "lawful jurisdiction of the Government authority seeking the financial records";
* there is reason to believe that the records being sought are relevant to a legitimate law enforcement inquiry; and
* there is reason to believe that the notice will result in
  a. endangering the life or physical safety of any person;

b. flight from prosecution;

c. destruction of or tampering with evidence;

d. intimidation of potential witnesses; or

e. otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the other specified circumstances.

The court may grant the requested delay for a period of up to 90 days. The government also has up to ninety (90) days after serving a search warrant to mail a copy of the warrant to the customer's last known address. The government authority may also apply to a court for a further delay in the mailing of the notice of up to 180 days following the service of the warrant. The delay order also prohibits a financial institution from disclosing to the customer that records have been obtained or that a request for records has been made until expiration of the delay period.

The Administration bill repeals the protective provisions which require the customer to be notified when his or her financial record have been transferred within the Government. Customer notification, like several other protections in the Financial Privacy Act, has fallen prey to a lack of understanding and misrepresentation about the current law. The following are two examples.

The Justice Department recently told an audience at a Bank Secrecy Act Seminar that the delayed notice provisions in the Right to Financial Privacy Act were ineffective and impeded law enforcement efforts because of the "randomness" of judicial approval. The truth behind this statement can be found in the annual report provided to Congress by the Administrative Office of the United States Courts on the Application for Notice Delay under the Financial Privacy Act (copy attached). In the report, it is shown that since the Act's inception, only 30 delay applications have been filed by Federal Government agencies and all 30 were approved by the courts.

Recently, the Justice Department in a letter to the editor wrote that the Administration bill removed the customer notification requirement in "three limited types of cases: narcotics trafficking, money laundering, and embezzlement committed against a bank or bank supervisory agency." However, this is not the case. Justice omitted the most far-reaching

language that is the new Section 3413(1) which reads in part that nothing in this title ... shall apply when there is a mere reason to believe in the relevance of any possible violation of any law relating to crimes by or against financial institutions or supervisory agencies. This does not even approach the wide area of activities that would be included in the vague definition of the new crime of money laundering.

Preemption of State Privacy Laws

Section 3(g) of S.1335 adds a preemption provision to the Right to Financial Privacy that preempts "any Constitution, law or regulation of any state or political subdivision thereof, as well as any administrative or judicial interpretation of such provision, that is not identical to this bill" and "that is more restrictive of disclosure to a Government authority concerning a possible violation of any statute or regulation than the provisions of this title and regulation promulgated thereunder."

This proposal contradicts the long-held belief in states' rights. By preempting state constitutions, state laws and judicial interpretation, the Administration is taking away the right of the state to decide how it will protect the privacy of its citizens. Several states specifically guarantee a right to personal privacy in their constitutions.[1] Others have enacted detailed statutes concerning financial privacy.[2] In Texas, for example, financial institutions are required to give notice to customers prior to disclosure. Customers in Texas are provided with notice and challenge procedures. California requires a depository institution to balance the government's need for the information with the customers' right to privacy.[3]

Conclusion

Mr. Chairman, members of the committee, we hope you will accept our comments for what they were intended — constructive criticism. The industry I represent has as great if not greater an interest in stemming the flow of money from illegal activities into legitimate business as does any other industry. We believe, however, that merely creating a broad crime of money laundering and removing certain rights to privacy will not fulfill this commitment.

As we pointed out in our testimony, the government today has access to massive amounts of reports and information from financial institutions and has both the authority and ability to obtain additional information. The information that is available and potentially available needs to be put to effective use.

Finally, Mr. Chairman, this seems to us to be a good time to have financial institutions, law enforcement officials, and Congress, as well as other interested parties, sit down and discuss what information is available, what information is needed to stop the flow of illegal funds, and how we can utilize this information while protecting the rights of our customers and your constituents. I will be happy to respond to any questions you may have.

ENDNOTES

[1]Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New York, South Carolina, and Washington.

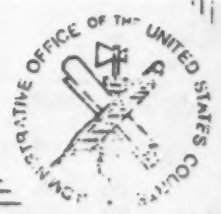
[2]California, Maine, Oregon, and Texas.

[3]At least four states parallel the Federal Right to Financial Privacy Act (California, Nevada, New Hampshire, and Oregon). Other recent laws on financial privacy on the state level include: Minnesota which prohibits any government authority from gaining access to or copies of the contents of financial records of customers of a financial institution unless the records first are reasonably described and then either the customer authorizes the disclosure, the records become the subject of a search warrant or a judicial or administrative subpoena, or the records are disclosed pursuant to a criminal investigation. The act requires the government authority seeking access to notify the customer within 180 days unless a delay of notice is obtained, and proposals such as H.B.286 in North Carolina which would limit government access to a customer's financial record and provide a delay notice mechanism; and Senate Bill 1014 in New Jersey which is also modeled on RFPA. The North Carolina proposal is a direct result of the concern expressed by residents of a state court decision on financial privacy. An example of the consternation caused by tampering with customer rights can be seen in an attached editorial from the News and Observer in Raleigh.

ATTACHMENT #1

REPORT ON APPLICATIONS FOR DELAYS OF NOTICE AND CUSTOMER CHALLENGES UNDER PROVISIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

FOR CALENDAR YEAR 1984



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

Report of the Director of the Administrative Office of the U.S. Courts on Applications for Delays of Notice and Customer Challenges Under Provisions of the Right to Financial Privacy Act of 1978

This is the sixth report submitted to Congress in accordance with the provisions of the Right to Financial Privacy Act of 1978, Title 12 U.S.C. Section 3421(a). The report covers the period from January 1, 1984 through December 31, 1984. The following text explains the reporting requirements of the statute and provides a summary and analysis of reports submitted by clerks of the U. S. district courts.

Sincerely,

Joseph F. Spaniol, Jr.
Deputy Director

April 1985

CALENDAR YEAR 1984 REPORT ON APPLICATIONS FOR DELAYS OF NOTICE AND CUSTOMER CHALLENGES UNDER PROVISIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Reporting Requirements of the Statute

Title 12 U.S.C. Section 3421(a) requires the Director of the Administrative Office of the U.S. Courts to report to Congress on the number of applications by U.S. government authorities under Section 3409 for delay in notifying a customer that access to the customer's financial records has been requested. The Director is also required to report the number of actions initiated by customers under Section 3410 to enjoin a government authority from obtaining financial records. This report includes the number of notices of delay sought; the number granted under each subparagraph of Section 3409 (a)(3); and the number of customer challenges to release financial information to U.S. government authorities.

Summary and Analysis of Reports

Applications by Government Authorities for Delayed Customer Notice

During calendar year 1984 ten applications for delayed customer notice were filed by Federal government agencies. The Federal Bureau of Investigation in the District of Nebraska applied for all ten and was granted a 90-day delay of customer notice.

Table 1 indicates the total number of applications for delayed customer notice filed by government agencies during 1979 through 1984. A total of 30 applications have been filed by various government agencies since the Act went into effect.

All requests applied for under the Act were granted because it was believed that customer notice would result in one of the following actions:

- destruction of or tampering with evidence;
- flight from prosecution; or
- seriously jeopardize an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding.

Table 1
Applications by Government Authorities for Delayed Customer Notice
Pursuant to Title 12 U.S.C. Section 3409
For the Calendar Years 1979 through 1984

Calendar Year	Total Number of Delayed Customer Notice Applications	Number of Delayed Customer Applications		Reason Granted				
		Granted	Denied	A	B	C	D	E
1979 ...	15	15	-	-	14	-	-	1
1980 ...	2	2	-	-	1	1	-	-
1981 ...	2	2	-	-	-	1	-	1
1982 ...	0	-	-	-	-	-	-	-
1983 ...	1	1	-	-	-	1	-	-
1984 ...	10	10	-	-	-	-	-	10

Reason Granted:

(A) endangering life or physical safety of any person;
(B) flight from prosecution;
(C) destruction of or tampering with evidence;
(D) intimidation of potential witnesses; or
(E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceeding subparagraphs.

Customer Challenges

Under Title 12 U.S.C. Section 3410, a customer may challenge the right of a government authority to obtain his/her records from a financial institution by filing suit in the appropriate U.S. district court. During 1984 a total of six customer challenges were filed against two government authorities. Five customer challenges were filed against the Securities and Exchange Commission and one was filed against the Secretary of Agriculture. Of the six challenges filed, three were dismissed and three were denied.

A total of 57 customer challenges have been reported filed in U.S. district courts since the Act became effective on March 10, 1979. A review of the data from the civil cover sheets and the court docket sheets has shown that one case reported in Indiana, Northern as pending at the end of 1982 and 1983 was not a customer challenge. This case was filed as a Social Security benefits claim (challenging a decision made by Social Security, not a customer challenge).

In the 1983 report the one case reported in Connecticut as pending at the end of 1983 was denied on January 3, 1984.

ATTACHMENT #2

NEWS & OBSERVER
RALEIGH, N. C.
M-133,000 S-160,000

AUG-23-84

195 *This newspaper's opinion*

Alarming privacy loss

Under the Right to Financial Privacy Act of 1978, bank customers gained protection against federal agencies' inspection of their financial records without their knowledge. The act required the government to notify a person whose records were sought from banks and to convince a court, if challenged, that the investigation was justified. But North Carolinians have been informed in a disturbing ruling by three judges of the state Court of Appeals that the same kind of restraint doesn't apply to state agencies.

If this rejection of an appeal by North Carolina National Bank is allowed to stand, the General Assembly must pass remedial legislation as quickly as possible. Otherwise, criminal investigators will hold fishing rights to every private bank account in the state with only a nod from a judge needed to exercise them.

This alarming state of affairs stems from a ruling by Judges Clifton E. Johnson, R.A. Hedrick and Cecil J. Hill upholding an order issued by Superior Court Judge Russell G. Walker. He directed NCNB in Guilford County to give the state access to a customer's records and told the bank it must not notify the customer of the examination for 90 days. The court says that the bank had no standing to plead a customer's constitutional right in that situation. But a 90-day gag also removes the individual's chance to argue against the invasion of his records.

The appeals court judges acted essentially on the ground that a corporation's right to Fourth Amendment search and seizure protection is much more limited than an individual's. The obvious problem with this is that the investigators wanted to examine a customer's finances, not those of the bank. Thus the panel's argument that a bank must submit to "exhaustive state scrutiny" in exchange for state recognition rings hollow.

Customers have a right to expect banks to maintain confidentiality about transactions in the absence of obvious or probable violations of law that justify the state's scrutiny of the records. In the NCNB case, however, the state's criminal investigators said only that they "had reason to believe" that their look at the records would be in the best interest of justice. That's not good enough.

In the opinion written by Judge Johnson, the panel does offer a cautionary note. The state, say the judges, should make a more complete statement of the circumstances behind its petition and show how disclosure would serve justice. This still begs the question of whether — perhaps out of mere curiosity or on a hunch — the state should be permitted to dig around in a person's bank accounts. Where do the Fourth Amendment safeguards begin for the customer?

The panel justifies its ruling, in part, with the argument that it's difficult for law-enforcement agencies to get at bank records in the early stages of investigation. Proceedings calling for a grand jury, a finding of probable cause or issuance of subpoenas or warrants are time-consuming and expensive.

Exactly. And that's as it should be. These procedures were written precisely to prevent investigators from poking around in private records willy-nilly and without sufficient cause. If the law permits that sort of thing — and that certainly is an issue for a higher court to decide — then the law, to quote Finley Peter Dunne's Mr. Dooley, "is a ass, a idiot.".

Questions for Mr. Hadlow

from

Senator DeConcini

1. Mr. Hadlow, what is a bank's present responsibility under the Right to Financial Privacy Act?

   Mr. Hadlow: The banks present responsibility under the Right to Financial Privacy Act is procedural in nature. That is, it is precluded from releasing records to governmental authorities except under certain specific conditions.

2. Do you believe the Right to Financial Privacy Act is effective in protecting the legitimate financial privacy interests of organizations and individuals?

   Mr. Hadlow: Yes, as to individuals, but it does not really protect organizations.

3. The Administration bill charges financial institutions with determining whether information may be relevant to a possible violation of law. Doesn't this place an awful lot of responsibility on bank officials? You are supposed to determine (1) whether a violation of law may exist, and (2) the relevance of information you may possess. Can bank officers adequately carry out these responsibilities?

   Mr. Hadlow: Yes, in reality it would not be senior management in a bank, but tellers and branch managers who would make these determinations.

4. You are protected under the exemption of the Right to Financial Privacy Act only if you have "reason to believe" the information may be relevant. What happens if a court determines later that you didn't have such "reason to believe"? Do you know what this standard requires? Could you compare it to what your responsibilities are at present under the Right to Financial Privacy Act?

   Mr. Hadlow: If the Court determines we did not have "reason to believe", then I assume we would be libel in a civil action for actual damages and punative damages.

   Current standard in section 3403 (c) speaks to a relevant standard and this is, in my opinion, something more than a mere supposition.

5. S. 1335 would make it a crime for anyone to participate in movement of funds with reckless disregard of the fact that such funds represent the proceeds of unlawful activity. What do you think this means in the context of normal banking operation? How would you advise your employees as to their responsibilities under this provision?

   Mr. Hadlow: First, let me say that to the best of my knowledge, "reckless disregard" is a tort term, and is not frequently used in criminal statues. Second, I can only reiterate the point made in the staff memorandum prepared for the House Subcommittee on Crime.

   "Under the reckless disregard state of mind, the government could prosecute any and all employees who receive and cash or deposit a pay check of a corporation that was guilty of a felony that resulted in a profit to the corporation since their salary is derived directly or indirectly from the proceeds of the crime eg. employees of E.F. Hutton, etc."

   It seems to me we don't want to put the Hutton employee and the bank teller in jail. We want to put individuals who try and shelter what they know are illegal proceeds. Let's narrow the definition, and make it as specific as possible. We need to convict the guilty not harass the innocent.

Questions for Mr. Hadlow

from

Senator Biden

1. Position on further defining what Banks can turn over to law enforcement.

   Mr. Hadlow there is a provision in the Administration's bill section 3(c) that seeks to clarify the types of information that Banks can initially turn over to law enforcement concerning suspicious activity. What is the banker's position on this section?

   Mr. Hadlow: We had a difficult time understanding why this section was in the bill. The regulatory agencies are currently requesting all of this information and more in the new criminal referral forms. I would like to submit a copy of our comment letter* to the Comptroller of the Currency on this subject.

   We have no objection to giving specific information on a suspected crime as long as the statute delineates the specifics, and does not require we turn over our records to the governmental body.

2. Bank responsibility to comply with the law.

   Mr. Hadlow, I wonder if you could tell us what responsibility the banking institution has in complying with the provisions of the Bank Secrecy Act and where does the banking community draw the line on what their responsibility should be to help prevent crime?

   Mr. Hadlow: There is no problem with complying with either the Bank Secrecy Act or the Right to Financial Privacy Act. Banks now turn over information which may be relevant to a possible violation of a statute.

   We also have any obligation to our customers not to allow the government to use banks for fishing expeditions into their financial records.

   As I pointed out earlier, financial institutions were found guilty of failing to file CTR's, not of taking part in criminal activities.

* ATTACHED

AMERICAN
BANKERS
ASSOCIATION

1120 Connecticut Avenue, N.W.
Washington, D.C.
20036

EXECUTIVE DIRECTOR
GOVERNMENT RELATIONS

Edward L. Yingling
202/467-4097

October 25, 1985

Ms. Lynnette Carter
Communications Division
Office of the Comptroller of the Currency
5th Floor
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20219

Re: Docket No. 85-14, Reports of
Suspected Crimes.

Dear Ms. Carter:

In response to the notice of proposed rulemaking on Reports of Suspected Crimes, published in the August 28, 1985 Federal Register, the American Bankers Association is submitting these comments. The American Bankers Association is the national trade and professional association for America's full service banks. Our Association is comprised of approximately 12,000 member banks, representing almost 90% of total industry assets.

The Office of the Comptroller of the Currency (OCC) is proposing to require national banks to use either the "Long Criminal Referral Form" (Long Form) or the "Short Criminal Referral Form" (Short Form) when reporting the occurrence or discovery of any known or suspected criminal violation of any applicable Federal or state statute, or any mysterious disappearance or unexplained shortage of bank funds or other assets. The Short Form would be used when the suspected amount of loss was less that $10,000 and would require information such as the approximate date and dollar amount of loss, the type of crime, a brief summary of the violation, the identity of any person suspected, and the location of the offices to which the report is being sent. The Long Form would be used when the suspected amount of loss was greater than $10,000 or when the loss involves a bank insider, executive officer, director, or principal shareholder.

The proposed regulation would no longer require reports on mysterious disappearances or unexplained shortages of $1,000 or more if they were due to errors which had been discovered and corrected within seven business days. When a national bank is in doubt as to whether or not to file a report, the proposal recommends that a report be filed. For example, a customer's pattern of cash deposits of just under $10,000 may not trigger the Bank Secrecy Act currency reporting requirements, yet may indicate the existence of a money laundering operation. The OCC suggests that a Criminal Referral Form could be used to report such activity.

Under current regulations, a national bank is required to make an immediate written report to the OCC, the U.S. Attorney, the FBI, and the bank's bonding company when known or suspected thefts, embezzlements, check-kiting operations, misappropriations or other defalcations or other criminal violations involving bank personnel or bank funds occur. Reports on mysterious disappearances of bank funds of $1,000 or more are also required.

A national bank is required to include the identities of persons suspected and the reasons for such suspicion in the report. 12 CFR Section 7.5225.

The American Bankers Association shares the concern of the OCC and the law enforcement community over the presence of criminal activity in national banks. However, our Association believes that the proposed implementation of the Criminal Referral Forms as a means to identify patterns of criminal activity and apprehend perpetrators of crime in national banks raises a number of significant concerns. The proposal would "deputize" bank personnel, is overly vague, would subject banks and bank personnel to the risk of additional liability, would place an overwhelming burden on bank resources, and would not effectively move the OCC or law enforcement closer toward their stated goals.

Deputize Bank Personnel

The proposed rule would expand the current requirement for national banks to report known or suspected criminal violations involving bank personnel or bank funds, by adding a requirement to report any known or suspected criminal violation of any section of the United States Code or applicable state statutes involving the affairs of the bank, rather than "growing out of the affairs of the bank." This additional requirement would make a bank a member of the law enforcement community. If a bank were required to report criminal activity and the names of those persons committing the crime, the bank would not be called upon to do anything more than its "civic duty." Indeed, the price an ordered society demands is the responsible participation of its citizens.

This proposed rulemaking, however, is requiring much more of a bank, i.e., to become an extension of the criminal justice system. Bank personnel will have to be able to discern between ordinary banking transactions and any known or suspected criminal violation of any section of the United States Code or applicable state statutes involving the affairs of the bank. For example, an employee of a bank, located in a neighborhood where most of their customers deal in cash, may receive deposits from the local dry cleaner in $8,000 cash on a daily basis. Such transactions would not require the filing of a form under the Currency and Foreign Transactions Reporting Act requirements. 12 U.S.C. 5311 to 5322. However, under the proposed requirements, the teller would have to determine whether such normal transactions should be reported on a criminal referral form as suspected illegal activity.

A more burdensome example is presented by Racketeer Influenced and Corrupt Organizations (RICO) criminal statutes. Because RICO statutes are criminal violations, bank personnel will have to determine whether any deposit or withdrawal could be evidence of a possible violation of a RICO statute - investing in any enterprise affecting interstate commerce if the funds for the investment are derived from "a pattern of racketeering activity" (these activities are defined to include: murder, drug dealing, bribery, robbery, extortion, counterfeiting, mail fraud, wire fraud, embezzlement from pension funds, obstruction of criminal investigations, fraud in the sale of securities, etc.). Banks will have to provide training in Federal and state criminal law, and will also have to decide which employees, from tellers up to the chief executive officer, will need to receive such training. Under this proposal, a bank teller who had a shortage of $1,000 that was not resolved within 7 days, due to an accounting error, would find his or her name on a Federal criminal referral form.

VAGUE

Our Association opposes the implementation of this proposal because it is inherently vague, making it impossible to know what is required of banks and bank personnel. If banks are going to be required to become knowledgable in criminal law, they will need more clarification on how the OCC defines certain criminal activity. If the definition of check-kiting automatically includes check losses, the return of any check for reason of non-sufficient funds could trigger the filing of a criminal referral form.

If every loss from an automatic teller machine (ATM) is a possible suspected non-employee larceny, no criminal referral forms will be filed; if not, then every ATM malfunction or error will require a criminal referral form. The proposed regulations do not address any of these ambiguities. A report would be required within seven business days of discovering suspected theft, embezzlement or misapplication of bank funds. A report would be required within fourteen business days of discovery in the case of any mysterious disappearance or unexplained shortage of bank funds of $1,000 or more which is not located by the bank within seven business days of discovery. The bank that filed a referral form on "a mysterious disappearance" within fourteen days of discovery, only to find out later that the incident was really embezzlement, could be penalized for not filing a timely report on embezzlement. Ambiguities such as these are spawned by the vagueness found in the Criminal Referral Forms of the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC), as well as the OCC. Future guidelines and clarifying language must be adopted and should result from a cooperative effort of the OCC, the FRB and the FDIC.

Increased Risk of Liability

The OCC proposes to impose civil money penalties on the bank, its officers and directors for failure to file criminal referral forms. This threat of liability will force banks to second-guess what may or may not be considered suspected criminal activity. The degree of compliance with this regulation will largely be determined by the interpretation of particular bank examiners of when an ordinary occurrence points to a crime against the bank. This "incentive" for the bank to err on the side of filing too many forms runs into direct conflict with the increased risk of suit against the bank for libel, slander, defamation of character, and harassment, to name a few. Each person the bank names in the referral forms could become a plaintiff in a suit against the bank. The Long Form question #7(c) asks the bank to indicate whether the suspected violation appears to be an isolated incident or whether it relates to other transactions. Incorrect "judgment," i.e. listing other unrelated persons and accounts in answering this question, would expose the bank to multiple suits arising out of one occurrence.

In addition, persons in states such as California could sue the bank for invasion of privacy. Relying on the California constitutional provision that guarantees a right to personal privacy, the California Supreme Court held that a depositor could challenge a bank's unauthorized disclosure of his bank records as an illegal search and seizure, when legal process was not followed. The proposed regulation offers no protection against such liability.

The Long Form also forces the bank to choose between complying with this regulation on reporting suspected crime and complying with The Right to Financial Privacy Act (12 U.S.C. 3401 to 3422). If a bank completes Long Form question #7(b), it would "relate key events to documents and attach copies of those documents."

> Nothing in [The Right to Financial Privacy Act] shall preclude any financial institution, or any officer, employee, or agent of a financial institution from notifying a Government authority that such institution, or officer, employee, or agent has information which may be relevant to a possible violation of any statute or regulation. (12 U.S.C. Section 3403(c)).

Under current law, a financial institution that discloses financial records "in good faith reliance upon a certificate of compliance with the Financial Privacy Act by any government authority" will be protected from liability for improper disclosure. Therefore, under the proposed long form, the Government would be in possession of financial records not available to them under the Financial Privacy Act, for there would be no certificate of compliance.

Increased Burden

The proposed rule will place a tremendous burden on the resources of the bank. The proposed requirement to file completed Short and Long Forms within seven business days of the discovery of the suspected violation is unrealistic. In addition to the vagueness of this time requirement as already discussed, fixing seven days within which to complete the forms makes compliance very difficult. For example, a completed referral on a suspected defalcation involving bank funds in most cases would require at least 14 to 21 days before enough information can be compiled to complete a referral form. Depending upon the answers to some of the questions raised, supra, correspondent, regional, and money center banks will need to hire new personnel just to complete referrals on NSF checks. A majority of cases that would require a Long Form require lengthy internal investigations before enough "hard" evidence can be gathered to make a responsible referral. If such short time demands are kept, the result will be incomplete, inaccurate forms for the OCC, and increased liability for the banks.

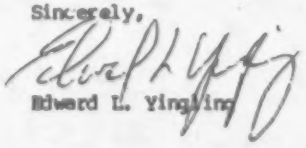
Missing the Goals

The implementation of the required filing of the Long Form and Short Form will not move the OCC or law enforcement closer toward their stated goals. The OCC has proposed to eliminate the burden placed on banks by the current reporting system (12 CFR 7.5225). For reasons stated above, the new requirement will increase the burden placed on banks dramatically. The limited benefit from this proposal does not outweigh the burden it will place on banks. The OCC states that these changes will facilitate the assessment and investigation of possible criminal matters, aid in the identification of patterns of criminal misconduct, and improve the OCC's ability to track the disposition of criminal referrals.

The OCC has offered no evidence that the current system of reporting known or suspected criminal activity is inadequate. The assessment and investigation of possible criminal matters and the identification of patterns of criminal misconduct will be enhanced by improving the coordination between the OCC and the law enforcement community.

We appreciate this opportunity to comment and offer our assistance in working toward a more reasonable means by which the OCC, law enforcement, and banks may reach their goals.

Sincerely,



Edward L. Yingling

Senator MCCONNELL. Who would like to go next? Mr. Nickerson.

STATEMENT OF WILLIAM W. NICKERSON

Mr. NICKERSON. Mr. Chairman, my name is William W. Nickerson. I am an attorney in Washington, DC. I am formerly Deputy Assistant Secretary for the U.S. Treasury Department, who wrote the 1980 Amendments to the Bank Secrecy Act's regulations and initiated Operation Greenback, which to date has resulted in the seizure of in excess of $100 million in its various operations throughout the United States.

I want to thank the committee for requesting that I testify.

While I concur that every possible effort should be made to interdict money laundering, we must be mindful that these goals can be accomplished within the parameters of the Bill of Rights and certain Federal statutes that protect our individual freedom.

Strong criminal enforcement and the protection of our basic civil rights are not mutually exclusive. In fact, sir, they go hand in hand. It is the protection of these individual liberties, such as reasonable expectation of privacy, that emphatically distinguish the United States from totalitarian regimes.

As the father of a 15-year-old son, I strongly recognize and applaud the Government's action to employ every reasonable means to protect our children from narcotics and other insidious activities. While there is no doubt that the poor suffer the greatest from the effects of criminal activity, a recent case concerning students at a wellknown New England prep school demonstrates that the effects of narcotics touches every strata of society.

In any successful campaign against organized crime, there is no question that Federal authorities must target those individuals and institutions who attempt to seclude illicit profits.

In 1980, as the Deputy Assistant Secretary of the Treasury, I drafted the amendments I mentioned before to the reporting and recordkeeping requirements of the Bank Secrecy Act and instituted Operation Greenback so as to effectively attack this problem.

I feel that the provisions contained in S. 1335 have both a number of obvious and hidden pitfalls. These provisions jeopardize individual rights and are counter-productive to effective criminal enforcement.

In addition, the 1985 Omnibus Crime Act provided additional armaments to the Federal arsenal to combat money laundering. Violation of the Bank Secrecy Act is a predicate RICO offense; grounds for a title III wiretap, and makes any and all willful violations of the act a felony, as well as providing for other enforcement tools.

While S. 1335 has been drafted with good intentions, I believe it contains certain aspects that will seriously jeopardize individual privacy without enhancing Federal enforcement.

In fact, the additional paperwork that would be generated by S. 1335 and parts of its companion legislation could be counterproductive to the analysis of data that is already being received under the Bank Secrecy Act.

For example, in earlier testimony by Mr. Queen, he stated that there was a backlog of some 300,000 to 400,000 reports because of the recent change in sending reports to the Detroit centers. I would

suggest that that is a conservative statement. I know for a fact that to request an exemption that falls outside the parameters set forth in the 1980 amendments takes anywhere from 90 to 180 days and in some instances even longer.

Keep in mind, members of the committee, that many of these exemptions are for entities such as the public utilities, where there is no reasonable grounds to suspect that the utility would be in any way engaged in criminal activity.

I would now like to offer some specifics on the proposed legislation.

First, I strongly support those elements of the proposed legislation which make it a Federal crime to order, facilitate, or perform a function aimed at laundering money and thereby attempting to circumvent requirements of the Bank Secrecy Act. This extension of criminal and civil penalties to individuals other than financial institutions or their employees is long overdue. The provision will have a chilling effect on those who serve as couriers for illegal enterprises.

Second, I strongly support an automatic 30-day delay in the notice provision to the customer where the government secures specific bank records via a subpoena issued by a grand jury, an order of the court, or where the bank has reasonable cause to believe it is being used as a target for fraud.

I also suggest that increased penalties included in the proposed legislation are necessary. However, I would like to say that the penalties that were incurred, for example, in the Bank of Boston, could have been serious by increasing the number of indictments against the bank and subsequently convicting the bank on these charges.

I am opposed to any provisions that would place an affirmative responsibility on an institution to identify an individual account or provide the Government with financial information based solely on a reasonable belief that it may be being used as an agent, conduit or depository for proceeds of criminal violations. There should be no affirmative responsibility on the part of the financial institutions to volunteer this information.

If enacted, S. 1335, the U.S. Government should indemnify any institution that surrenders such information. In other words, we are asking the institution, and its employees that are not trained as a law enforcement officer or, attorneys, to identify what is a suspicious transaction. I think that goes far beyond the bounds of reality. At the same time, we are providing severe penalties for violations under language that is usually attributed to a civil statute.

Fourth, any provision to modify the Right to Financial Privacy should be narrowly drawn and specifically focused. On its face, S. 1335 appears to totally abrogate the Right to Financial Privacy.

The Bank Secrecy Act already provides important exemptions to the act. If the Government focuses its attention on the strong enforcement of this act, the shotgun approach proposed in this legislation would not be necessary.

There is sufficient evidence that the Government currently lacks adequate resources and expertise to fully utilize the information already available under the Bank Secrecy Act. To expand the reporting requirements to other undefined monetary instruments and to

place an affirmative responsibility on banking institutions is unrealistic and unnecessary.

Senator MCCONNELL. Excuse me, but could you wrap it up, Mr. Nickerson?

Mr. NICKERSON. Yes, sir.

In my wrap-up, all I would like to say is that we must keep in mind that the Right to Financial Privacy and similar legislation is the product of some overzealous and unjustified inquiries into people's personal lives.

These inquiries were not prompted by legitimate Federal enforcement needs, but for political purposes to satisfy sordid curiosities.

In my opinion, the enactment of this legislation could well create a climate which again encourages such abuses and may cause legislation which is much more restrictive than that currently in the Right to Financial Privacy.

Thank you.

Senator MCCONNELL. Thank you.

[Prepared statement and responses to questions follow:]

TESTIMONY

OF

HON. WILLIAM W. NICKERSON

LAW OFFICES OF LEONARD & MCGUAN

Mr. Chairman, members of the Committee, let me thank you for requesting my testimony on S. 1335, S. 1385 & S. 572, three extraordinary important pieces of legislation dealing with money laundering. In my formal testimony, I would like to limit my remarks to S. 1335 about which I have specific concerns and recommendations.

While we concur that every possible effort should be made to interdict money laundering a by product stemming from the sale of illicit narcotics and other organized criminal activities, we must be mindful that these goals can be accomplished within the parameters set forth by the Bill of Rights and certain federal statutes that protect our individual freedom.

Strong criminal enforcement and the protection of our basic civil rights are not mutually exclusive. We should use a balanced approach which accomodates both goals. It is the protection of individual liberties such as the reasonable expectation of privacy that make-up the core of our successful way of life and are the essential elements which separate the United States from totalitarian regimes that deny their citizens basic human rights.

As the father of a fifteen year old son, I strongly recognize and applaud the Government's action to employ every reasonable means to protect our children from narcotics and other insidious activities which are becoming increasingly available and affects the entire strata of society.

While there is no doubt that the poor suffer the greatest from the effects of criminal activity, a recent case concerning students at a well-known New England prep school demonstrates that it is naive to believe that "safe harbors" exist which protect our youngsters from the blight of narcotics.

In any successful campaign against organized crime, and particularly the narcotics trade, there is no question that federal authorities must target those individuals and institutions who attempt to seclude illicit profits. In 1980, as the Deputy Assistant Secretary of the Treasury, I drafted amendments to the reporting and record keeping requirements of the Bank Secrecy Act recodified at 31 U.S.C. 5311 et seq., as the "Money and Finance Act" and its pertinent regulations found at 31 C.F.R. part 103 et seq. and instituted Operation Greenback which has successfully seized over one hundered million dollars in illegal criminal profits. These efforts to target criminal profits and penalize financial institutions which assist in their laundering while not totally successful have had a positive effect on our nation's overall enforcement efforts.

I feel that the provisions contained in Senate S. 1335, better known as the Administration's Money Laundering Bill has a number of both obvious and hidden pitfalls. These provisions both jeopardize individuals rights and are counterproductive to federal enforcement efforts aimed at successfully convicting those who participate in or facilitate money laundering incident to criminal activity. The 1980 amendments to the Bank Secrecy

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Act's regulations were prompted by our belief that a successful attack on sophisticated criminal activity such as narcotics trafficking, loan sharking, extortions, etc., necessitate increasing the risk of exposure while reducing the incentive for this type of crime, i.e., money.

Crime is a cash business. Its very nature causes large sums of currency to flow through our nation's financial institutions. It is imperative that we continue to track these transactions through the authority provided for in the Bank Secrecy Act and its pertinent regulations.

In addition, the 1984 Omnibus Crime Act put bolstered teeth in the federal effort to combat money laundering. The Omnibus Crime Act of 1984, made a violation of the Bank Secrecy Act a predicate R.I.C.O. offense; grounds for a Title III wire tap; and makes any and all willful violations of the Act a felony.

Since leaving the government to enter private practice, I have never represented an individual or entity charged with narcotics violations or money laundering. I make reference to this fact to demonstrate my continued support for effective legislation against money laundering and my refusal, although often requested, to represent persons charged with such offenses. Nevertheless, I have a real and increasing concern that certain provisions of the Administration's proposed legislation, while drafted with noble intentions, seriously jeopardizes individual rights without any realistic expectations of enhancing the federal enforcement efforts.

In fact, the additional paperwork generated by this proposed legislation could be counterproductive and defeat the Government's ability to provide the sophisticated analysis necessary in developing tactical intelligence necessary to fight organized crime. There is evidence that the government is currently unable to adequately utilize the information they receive. This is due to an increased volume of information an an inexplicable propensity to dwell on minutiae. That is, there is a recent phenomonen which places more emphasis on harmless error in reporting minor details than on enforcement programs aimed at major narcotics traffickers and other organized criminal combines.

I would now like to go into the various elements of the proposed legislation:

1. I strongly support those elements of the proposed legislation which make it a federal crime to order, facilitate or perform a function aimed at laundering money and thereby attempting to circumvent the requirements of the Bank Secrecy Act recodified as the Money and Finance Act at 31 U.S.C. 5311, et seq. and its pertinent regulations found at 31 C.F.R. Part 103 et seq. This extension of criminal and civil penalties to individuals other than than financial institutions or their employees is long overdue. The provision will have a "chilling" effect on those who serve as couriers for illegal enterprises.

2. I strongly support an automatic 30 day delay in the notice provision to the customer where the government secures specific bank records via a subpeona issued by a grand jury, an

order of the court or where the bank has reasonable cause to believe that a certain account or particular transaction poses a threat to the institution's financial integrity.

3. I am opposed to any provisions that would place an affirmative responsibility on an institution to identify an individual account or provide the government with financial information based solely on a reasonable belief that the above may be being used as an agent, conduit or depository of the proceeds from a criminal violation or where said transaction or account is being used to undermine the financial integrity of the institution. There should be no affirmative responsibility on the part of the financial institutions to volunteer this information. The threshold standard employed, i.e., reasonable cause, is so low and we may presume that employees of financial institutions are not generally familiar with the degrees of proof necessary to support this standard and would place the institution or its employees in jeopardy of violating the right to financial privacy. However, where institutions or an employee does surrender such information "in good faith", they should be indemnified by the United States against any individual by the customer that their rights were violated.

4. Any provisions which modify the Right to the Financial Privacy Act of 1978, including those suggested above, should be narrowly drawn and specifically focused. On its face, the language in S. 1335 appears to be a total abrogation of the Act. The Bank Secrecy Act already provides important exemptions to the Act. If the government focuses its attention in a

coherent, rational and expert manner in enforcing the record keeping and reporting requirement of the Bank Secrecy Act, this "shot gun" approach proposed in S. 1335 would be unnecessary.

There is sufficient evidence that the government currently lacks adequate resources and expertise to fully utilize the information already available under the Bank Secrecy Act. To expand the reporting to other undefined monetary instruments and to place an affirmative responsibility on financial institutions to make judgments on whether or not certain transactions are the product of criminal activities is overreaching. The language contained in S. 1335 is coercive in nature and could very well cause an institution out of fear of prosection, to provide customer information that has no legitimate value to any criminal or civil investigation. I repeat, with emphasis, that we are placing an enormous burden on our financial institutions whose personnel most likely lack the training and expertise necessary to make informed judgements as to whether or not certain financial transactions are sufficiently suspicious to warrant the surrender of records to the government. I strongly suggest this approach will yield little or no additional valuable information which is not already available; or can be attained under procedures set forth under the Right to Financial Privacy.

On the other hand, the government is enccuraging "open season" on financial disclosure by using these coercive provisions contained in S. 1335 coupled with the direction contained in

subsection 3A that allows a bank officer to turn over records that "may be relevent."

The lack of specificity in terms such as "may be relevent" only causes administrative nightmares for the financial institutions and unjustifiably erodes the customers basic right to some semblance of privacy.

Finally, it should be noted that the GAO has reported and the Administration has failed to demonstrate to the contrary that the Right to Financial Privacy poses a serious threat to effective law enforcement. We must remember that legislation in and of itself can not take the place of effective law enforcement.

In section 3b, I believe the proposed language allowing the transfer of information from one agency to another should be tightened. The Congress should ensure that sufficient safe guards are built in so that financial records do not end up in the hands of agencies or persons unless there are clear indications that the information they provide has a direct and significant relationship to criminal activity and is not merely the product of inter-agency curiosity.

We must keep in mind that the Right to Financial Privacy and similar legislation is the product of some overzealous and unjustified inquiries into people's personal lives. These inquiries were not prompted by legitimate federal enforcement needs, but for political purposes to satisfy the sordid curiosities of persons with perverse views of authority without any sense of responsibility.

In my opinion, the enactment of the provisions of S. 1335, could well create a climate which again encourages such abuses and may cause the enactment of legislation more restrictive than the Right to Financial Privacy and in turn dramatically "hamstring" our federal enforcement efforts.

I wish to again thank the Committee for inviting me to testify and I am willing to answer any questions you may have.

Answers to Judiciary Testimony of October 29, 1985 by William W. Nickerson

(1) Please tell the Committee what the primary intent was for the 1980 amendments to the Bank Secrecy Act?

1. The primary intent for the 1980 amendments to the Bank Secrecy Act Regulations found at 31 CFR Part 103 was the following:

   A. To give the financial institutions better directions and specification as to those activities that were appropriate for exemption from the reporting requirements.

      In 1979 and 1980, I directed all Florida Banks to submit copies of their exemption lists. This was due to the fast rate of growth in "inputs" i.e., cash flowing into the Florida Federal Reserve District in Jacksonville, without any corresponding increase in reporting. We discovered, for most Florida Banks, the sole criterion for placing an entity on its exemption list was that it was a large cash depositor. There was no correlation between the type of business the entity was engaged in and the amount of currency deposited. Therefore, we found certain entities such as boat, car and automobile dealership which traditionally do not deal in large sums of cash, being exempted. We had reason to believe such entities were being used to funnel cash that was proceed of illicit activity. Furthermore, the majority of Banks in Florida placed any entity or person on its exemption list solely because they dealt in high volume of currency.

   B. We specifically maded certain entities and transactions non-exemptable. This included the dealerships mentioned above and bank to bank international transfers of cash. We believed that these were prime facilitators for money laundering schemes.

   C. Secondly, there was inadequate data on persons or entities who were reported on 4789's (C.T.R.'s) as making large cash transactions. Therefore, we directed the bank to require customers to provide information such as their social security number, place of business, etc.

D. Additionally, we required more specific information on exempted entities and retained the right to direct the banks to delete any exempted customers. Said direction would be given where Treasury, through the Bank Supervisory Agencies or the I.R.S., found that such an exemption was inappropriate. Additionally, Banks were required to keep their list of exemptions, with an explanation for such an exemption in a central place for a period of five (5) years, where they could be reviewed by the Bank Supervisory Agencies or provided to Treasury upon request.

In short, our specific aim was to increase the data base provided by financial institutions so the government could better identify large depositors of currency who lack adequate explanation for excessive transactions. This is a prime indication of possible high level criminal activity.

(2) To the best of your knowledge do you believe the 1980 amendments have successfully been implemented and enforced? Please give examples.

2. This is a difficult question to answer in that I resigned from Treasury in June of 1981 and therefore, no longer have the direct access to the data and changes in reporting or the number of criminal cases which were resulted pursuant to these charges. However, I have been informed that the number of reports being filed have dramatically increased since 1980.

A. The data has been more complete and there has been a reduction in the number of entities on the exemption list.

B. The above factors have led to increased criminal and civil investigation.

However, I should note that in 1980 we supplied the I.R.S. with almost 1000 suspicious exemptions which should have been targets for at least a civil audit. To the best of my knowledge, little has been done, in this area.

(3) When you were proposing amendments to the Bank Secrecy Act was there any consideration to propose changes to Right to Financial Privacy Act like those proposed in S. 1335?

3. Yes, there were. However, these modifications were minimal and as I recall, limited to two areas. First, we believed there was a need for Administrative summons authority by the Treasury Department. Secondly, I recommended an automatic thirty (30) day delay in notice to the customers whose records were under review. However, in both instances, it was our policy that there had to be either probable cause to believe an account or entity was being used as a criminal device, or that an ongoing criminal investigation had been initiated and said information would be of significant value.

(4) Do you believe that the provisions of S. 1335 might in fact hinder our burden enforcement efforts? Please explain and give example.

4. Yes. I have every reason to believe that the government currently lacks the resources and expertise necessary to evaluate and analyze the information they currently receive. The new requirements called for in S.1335 would only generate increased paperwork which would only serve to

detract from their current capabilities. I strongly advocate additional resources, independent of the passage of S.1335, be allocated to the office of Enforcement of Operations at Treasury. They are the only segment of the government that has the sophistication and expertise required to provide proper analysis of the financial data vis-a-vis the Bank Secrecy Act. However, they sorely lack the resources to achieve their potential.

(5) Do you have any ideas for changes in the Bank Secrecy Act that are not included in these bills?

5. An automatic thirty (30) day delay in customer notice as outlined in my earlier answer. In addition, if S.1335 is enacted, I strongly urge that punitive damages be available to a customer whose records are obtained by the government, but the government fails to indict said customer. This should cause a "chilling effect" on unwarranted "frisking expeditions."

Senator McCONNELL. Mr. Berman.

STATEMENT OF JERRY BERMAN

Mr. BERMAN. Senator McConnell, Senator DeConcini, we are all freezing in this room, so let me try and be brief and get to the point.

I think that there is a consensus that money laundering legislation is necessary. The ACLU would not oppose a balanced and narrow approach to the issue—one that carefully takes into account not only law enforcement needs, but basic civil liberties.

We, from this point of view, strongly oppose—as do the bankers, the defense bar—the administration's legislation. On the other hand, we have no strong objection or any fundamental disagreement with Senator D'Amato's original bill and Senator DeConcini's proposal, one, because they focus on money laundering as described by the Organized Crime Commission, moving money through financial institutions, and are not more broadly cast, and second of all, they do not do damage to the Right to Financial Privacy Act of 1978.

Our principal objection to the administration's bill is that it would eviscerate the modest protection of that act, passed in 1978, and do so without any justification on the record.

In 1978, Congress recognized that we live in a record society, and that increasingly, with computerization, more and more personal and private information about our lives is held by third-party institutions such as banks.

They passed a statute which was a compromise to begin with. It did not establish very heavy burdens on the Government to obtain records. The Government only has to show that it is relevant to a law enforcement investigation. It requires notice and formal process in most cases, but in the context of this legislation that the administration is requesting, it should be recognized that the act has several ways for the Government to obtain records without notifying customers—pursuant to a grand jury subpoena, pursuant to a search warrant—and it can get a delay of notice in any case where there is a possibility that evidence will be destroyed or tampered with, or where an investigation would be jeopardized.

Mr. Chairman, at this point, in law, there is less protection for bank records than there is for cable subscriber information under

Federal statutes, and here comes the administration saying that RFPA is a major barrier to money laundering investigations.

So, what do they propose to do? In section 3(a), they would like to go back to the process whereby in certain crimes, banks would be able to turn over underlying customer bank records without notice to the customer, without going to court, without formal process—just turn them over to the Government. Now, it is three separate statutes—the Bank Secrecy Act, drug crimes—but the third one is the money laundering crime that they define in this bill. And it is not money laundering through financial institutions. It adds—money laundering is defined as "any transaction"—not simply money—but "any currency transaction"—a check, any money instrument used with the intent to engage in any illegal activity—or engaging in any monetary transaction knowing or in reckless disregard of the fact that the money may be derived directly or indirectly from illegal activity.

That goes far beyond financial institutions. As the district attorney pointed out, that could cover someone buying dope on a corner in Florida, because that is using money in an illegal transaction. That becomes money laundering. Any embezzlement, fraud, crimes which are covered by local, State and Federal law are swept within this broad new crime of money laundering.

As the Organized Crime Commission witness said, the administration did not decide to focus on financial institutions; they decided to take it a little broader. Well, they have taken it much broader.

Our objection in the first instance is that all of the records that may be relevant to an investigation under this statute can be turned over by banks informally to the Government. And there is an incentive, almost a coercive incentive, for banks to turn over those records, because banks are now worried, as the Bankers Association pointed out, about the reckless disregard standard where they could be prosecuted where they should have known that the transaction was derived from illegal activity. So they will turn over records to avoid any negligent liability.

Finally, they want to obtain bank records by grand jury subpoena and yet at the same time, not turn over the records to a grand jury for final scrutiny. They want to overturn State bank privacy statutes.

In conclusion, we think they want to wipe out this act. They have made no case for it on the record. They have ample means under the current act to get delay of notice. They have used that about 30 times in the history of the Financial Right to Privacy Act. They have been turned down once, and in 29 cases they have obtained records without notice.

So there are mechanisms for them to use under the act. They testify that banks are not coming forward with information about underlying crimes. They have an amendment in their bill which would clarify that banks can come forward with information about criminal activity. That is a fair compromise. That is all they really keep talking about. But to add amendments which would allow informal access to bank records would be to undermine this act. It is not necessary, and more narrowly drafted legislation such as Senator DeConcini's is really what the Congress ought to focus on.

Thank you, Senators.

[Prepared statement follows:]

TESTIMONY

OF

JERRY J. BERMAN
CHIEF LEGISLATIVE COUNSEL

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Committee:

Introduction:

On behalf of the American Civil Liberties Union, I want to thank you for requesting our testimony on proposed money laundering legislation. As you know, the American Civil Liberties Union is a nonpartisan organization of over 250,000 members dedicated to the defense of civil liberties guaranteed by the Bill of Rights.

We recognize that money laundering is a serious and growing problem in the United States and that legislation may be necessary to deal with it. However, we believe that any legislation in this area must be carefully crafted to balance the legitimate and demonstrated needs of law enforcement with the privacy rights and other civil liberties of bank customers and citizens. For this reason, we strongly oppose the Administration's proposal, S.1335, "The Money Laundering and Related Crimes Act of 1985." S.1335 is not a narrowly focused approach to the problem. Instead it is a prosecutor's "wish list" and a serious threat to civil liberties.

Our foremost objection is that S.1335 would eviscerate the modest protections for customer bank records established by the Congress in the Right to Financial Privacy Act of 1978 and would preempt state privacy laws which protect bank records. We also object to the breadth of conduct made criminal under the bill because it will increase the volume of bank records which may be turned over to the government in violation of established privacy protections and could lead to the investigation and prosecution of conduct which should be considered legal. The

bill would also establish new crimes which, if broadly applied by prosecutors, could adversely affect First and Sixth Amendment rights. We believe the Administration has not established on the public record a credible justification for gutting the Right to Financial Privacy Act or creating sweeping new criminal statutes in order to reach money laundering schemes. The Administration approach should be rejected.

In our testimony today, we will focus on the Administration bill because of its serious threat to civil liberties. However, we want to make it clear at the outset that we believe a balanced approach to the money laundering problem is possible. In this regard, we have no fundamental objection to the approach embodied in Senator Dennis DeConcini's bill, S. 1385 or Senator Alfonse D'Amato's bill, S.572, legislation that would make money laundering narrowly defined a crime without weakening the Right to Financial Privacy Act. Our principal concern with these bills is with the requisite intent or scienter necessary for someone to commit the crime of money laundering.

II. Privacy Concerns Regarding S.1335

As the price of living in today's society, citizens must turn over extensive personal information about themselves to government and private agencies to receive benefits, obtain credit, or conduct business. Information once kept in the home and protected from intrusion by the Fourth Amendment is now held by third party record holders. Bank records are a case in point. Checking accounts, loan applications, and bank credit card transactions contain considerable personal information about our finances, tastes, opinions, and travels. Today, with computerization, these records are readily accessible for investigatory purposes.

Unfortunately, the Supreme Court has not interpreted the Fourth Amendment in a way which affords citizens privacy protection for their bank records. In 1976 the Court held in United States v. Miller that citizens had no property or privacy

interest in bank records. In response the Congress passed the Right to Financial Privacy Act in 1978 to give citizens some expectation of privacy in bank records. In effect, the Congress overturned the Miller decision.

In all candor the Act is not a "model" privacy Act. When passed, it represented a compromise between privacy advocates who wanted notice and formal process each time the government sought individual bank records and law enforcement agencies who wanted flexibility in some circumstances. Under the Act, citizens, in most circumstances, must be notified that a demand for his or her records has been made by the government and afforded an opportunity to contest access in a court of law.

However, there are important exceptions to the notice and challenge requirements which must be understood in the context of evaluating the merits of the Administration's proposed amendments to the Act. Notice is not required if the government obtains a search warrant and the government may obtain a delay of notice pursuant to a grand jury subpoena or from a judge if it can demonstrate that there is a possibility of physical injury to a person, flight from prosecution, destruction of or tampering with evidence, or that notice would otherwise seriously jeopardize an investigation or official proceeding. Moreover, in court the government does not have to meet a probable cause or even a reasonable suspicion standard (as required for government access to cable subscriber information in the Telecommunications Act passed by Congress in the last session) to obtain customer bank records but only that the records are relevant to an investigation.

The amendments to the Right to Financial Privacy Act contained in Section 3 of S.1335 would seriously weaken the limited privacy protections in the Act without any demonstration on the public record that the Act presents a serious impediment to law enforcement investigations in general or of money laundering schemes in particular. At this point, we should look

at the proposed changes in RFPA and whether there is any demonstrated justification for them.

1. Disclosure of Bank Records Without Any Process

Subsection 3(a) would add a new exception to the privacy protections of the Right to Financial Privacy Act. It would permit a bank to disclose individual customer records to the government without notice or legal process when the bank "has reason to believe" that the information may be relevant to the violation of one of a group of specific laws (i.e. when there is suspicion of a crime by or against a bank; suspicion of a drug related offense; or suspicion of money laundering).

While this may appear on the surface as a "surgical" demand for a narrow category of bank records to meet a compelling social problem, the section actually amounts to "carte blanche" authority for the government to request and banks to turn over on their own initiative or out of fear of possible prosecution bank records in a wide variety of circumstances without notice to the customer or formal legal process.

First, the Administration's proposed crime of money laundering for which an exception is granted covers conduct far broader than what is commonly understood as money laundering activity. Although the Administration testifies about criminal elements laundering cash through banks in amounts under the $10,000 reporting requirement of the Bank Secrecy Act by buying cashiers checks, money orders, and the like (e.g. "smurfing") or more broadly transferring illegal cash into stocks, bonds, real estate, or business ventures, the scope of the money laundering offense in section 2 of the bill is sweeping. The offense literally covers any person who conducts any financial transaction whether in cash or other monetary instrument "with the intent to promote...carry on...or facilitate...any unlawful activity...which in any way or degree affects interstate or foreign commerce...or conducts any transaction "knowing or with reckless disregard of the fact that such monetary instruments or

funds represent the proceeds of, or is derived directly or indirectly from the proceeds of any unlawful activity." The definition of unlawful activity covers any federal or state crime punishable by a term of a year or more.

We read the crime to cover almost any crime and conduct which should not be criminal. It would cover buying drugs, illegal firearms, selling defective merchandise, fraud, embezzlement, and so on. A car salesman, a brokerage firm, a real estate company, or politician who engaged in any transaction with anyone in circumstances where they "should have known" that the money received was indirectly derived from illegal activity would also be guilty of money laundering.

While the money laundering offense raises questions of federalism and overbreadth to which we will return, in the context of an exception to the Right to Financial Privacy Act, it means extensive bank records are subject to the notice and legal process exception and may be turned over to the government. In this regard, banks are given enormous discretion to turn over records unilaterially. Section 3(a) allows a bank officer to turn over records whenever he or she "has reason to believe" the records "may be relevant" to a money laundering offense, drug crime, or violation of the Bank Secrecy Act.

The money laundering crime may even act as subtle coercion on banks to turn over records in this fashion---to avoid possible criminal prosecution in circumstances where they might be acting in "reckless disregard" of the fact that money in certain accounts was derived indirectly from illegal activity. The best way to avoid serious negligence is to check suspicions with the government by turning over bank records. One bank official has commented that while banks want to cooperate with the government in detecting illegal money laundering activity, the banks also want to protect customer privacy and not become "bank snitches." This statute is drawn in a way which may give them no other choice.

We believe this new exception to the current law is absolutely unnecessary. Present law permits a bank to release records in most circumstances only after the government has filed a proper demand and a customer is notified. However, present law does permit a bank, on its own initiative, to notify the government that it has information which may be relevant to a possible violation of the law. (Section 1103 of 12 U.S.C. 3403) The government can then obtain individual records by complying with the procedures in the 1978 Act. Moreover, as noted earlier, present law permits access to records without notice to a customer pursuant to a search warrant, grand jury subpoena, or when a court determines that notice would create danger of physical injury, tampering with evidence, or would otherwise seriously jeopardize an investigation. (See sections 1102, 1109 of 12 U.S.C. 3409)

We note that the government has made no showing that the Right to Financial Privacy Act procedures present a serious impediment to law enforcement or money laundering investigations. In fact the GAO has reported that the Act has not slowed down investigations and that the government has rarely, if ever, invoked its right to override the requirement that a bank customer be notified when the government has access to his or her records. In a 1984 "Report on Applications for Delays of Notice and Customer Challenges Under Provisions of the Right to Financial Privacy Act of 1978" by the Administrative Office of the United States Courts, it is revealed that the federal government requested delayed customer notices in only 10 cases. All occurred in one state, Nebraska. All requests were granted. In point of fact, the Report indicates that the federal government has filed only 30 delayed notice applications including the 10 in 1984 since the Act went into effect in 1979!

Instead of permitting banks to turn over records without process, the government should be satisfied if the law is clarified to indicate that banks may turn over information that

may be relevant to an investigation. In this respect, section 3(c) expands the amount of information that a bank can release to the government concerning its suspicions that criminal activity is or has taken place. Currently, the Right to Financial Privacy Act permits a bank to notify the government on its own initiative that it "has information which may be relevant to a possible violation of any statute or regulation." (Subsection 1103(c) of 12 U.S.C. 3403(c)) The proposed subsection 3(c) would add clarifying language explaining that such information may include the names of individuals, the types of accounts involved, and the nature of the suspected activity. This clarifying language appears reasonable to provide banks with some guidance. But with such a change, the release of individual records permitted by subscection 3(a) becomes even more unnecessary. With subsection 3(c), the banks can give the government enough information for it to proceed in its investigations, and if the government finds that it needs specific bank records, it can get them by complying with the procedures in the Act. If it needs delay of notice, present law provides the means for obtaining it.

2. Good-Faith Defense

On top of permitting banks to turn over bank records without notice and process, the Administration also proposes to give banks a "good faith defense" to civil liability when they do so. This section is an incentive for banks to cooperate with the government in going around formal process and dangerous to bank record privacy. Under current law, a bank has a good faith defense against liability if it discloses information when it has the appropriate government paper work in hand. Subsection 3 (c) would provide a defense against civil liability if the bank could show records turned over without process was done in a "good-faith belief that such records may be relevant to a possible violation of law." Any violation of law. Thus, under this section, a bank may be immune from liability for releasing bank

records about the Socialist Worker Party, an organization providing abortion counseling to teenagers, or a fundamentalist religious organization ---all in the "good faith belief" that their activities involve "possible violations of law." A mere request by a government investigative agency might be enough to justify a "good faith belief."

3. Exchange of Bank Records Among Different Government Agencies

Subsection 3(b) would permit financial records obtained by one government agency to be transferred to another agency without notice "if there is reason to believe that the records may be relevant to a matter within the jurisdiction of the receiving agency." The current Act permits such exchanges of customer information with only a minor paperwork requirement and subsequent notice to the customer (Subsection 1112(a), 12 U.S.C. 3412(a)) S.1335 would repeal even these minor protections, once again without any public record that they seriously impede investigations. If notice to a customer will interfere with an investigation, an agency can always ask a court to waive the notice requirement. (This, as we have noted, is an authority rarely invoked.) Keeping a record of exchanges among federal agencies--as required under current law--is important for accountability. It is also important that government observe the fair information principle embodied in the Privacy Act of 1974 and RFPA that personal information collected for one purpose should not be used for another without the subject's notice and consent. These protections should not be repealed.

4. Bypassing the Grand Jury

Subsection 3(f) would remove the requirement that the government actually present to a grand jury any bank record information it obtains through a grand jury subpoena. At first glance, this may appear as insignificant or actually a protection for the individual since it is a limitation on secondary

disclosure of bank record information. In fact, the requirement that subpoenaed information must be presented to a grand jury was intended to safeguard against abuses of privacy. Before using a grand jury subpoena to access bank records, federal agents must be on firm grounds, since they know that in the future they will be required to justify the access before a grand jury. This part of the current law seems a valuable safeguard against abuse and should not be altered.

5. Preemption of State Privacy Laws

Subsection 3(g) of the proposed Act would preempt state privacy laws which may be stricter than federal law. Again we do not think the government has shown that these state laws impede the investigations of bank fraud, or any other crimes. It seems therefore, that it is an unnecessary intrusion on the states to preempt their laws and a further erosion of bank record privacy. The subsection, if enacted, would wipe out statutes in Alaska, California, Connecticut, Louisiana, Maryland, New Hampshire, Oklahoma, and Florida.

6. Wiretaps

An additional privacy concern is that S.1335 proposes to add the crime of money laundering as defined as one of the offenses for which electronic surveillance is authorized under Title 18 U.S.C. 2510 et. seq. The American Civil Liberties Union opposes all wiretapping as a general search under the Fourth Amendment. While the courts and Congress may not agree with us, the Congress has recognized the intrusiveness of wiretapping and that it should not be used indiscriminately. The statute authorizes it for particular crimes punishable under federal law.

Because of the scope of the money laundering crime discussed above, adding the proposed section 1956 as a wiretapping offense would vastly expand federal wiretapping authority to cover a significant number of crimes up to now exempted from the wiretap authority of Title III. They would now be subject to wiretapping

by federal law enforcement agencies under the "money laundering" offense. We object in principle to adding any crimes under the Safestreets Act. If Congress adopts the Administration's definition of money laundering, which we oppose, we urge it not to add it to the crimes covered by the federal wiretap statute.

II. Breadth of the Money Laundering Crime

Independent of our concerns about bank record privacy, we urge the Congress to consider the possible overbreadth of the money laundering crime proposed in S.1335 and the wisdom and even constitutional difficulties posed by the enactment of such a sweeping criminal statute. As stated earlier, this bill does not only apply to cases where cash is laundered through a bank. It applies to <u>any monetary transaction</u> involving the movement of funds that affects interstate commerce conducted with the intent to facilitate any unlawful activity or with the knowledge or reckless disregard of the fact that the money was derived from illegal activity. It is not limited to cash transactions but applies to any monetary instrument, including cash, traveler's checks, personal checks, bank checks, money orders, investment securities, gold or precious coins, and negotiable instruments in bearer form. A host of issues are posed:

First, there is the issue of federalism. Under this statute, federal agencies would be able to investigate and prosecute as "money laundering" a myriad of crimes usually left to state and local authorities. The purchase of drugs, the sale of a handgun, real estate swindles, garden variety extortion, or misrepresentation in the sale of a used car could be reached under section 1956.

Second there is the problem of overbreadth which might affect protected constitutional rights. For example, a retainer received by a criminal defense lawyer might subject the lawyer to possible criminal prosecution for engaging in a money transaction knowing or in "reckless disregard" of the fact that the funds

were derived directly or indirectly from illegal activity. An investigation and prosecution in such circumstances poses Sixth Amendment Right to Counsel as well as Attorney Client Privilege issues. The example, given recent prosecutorial efforts to seek "forfeiture" of attorneys fees paid in drug cases, is not farfetched.

We note in this context that section 9 of the bill amends Title 18 of the United States Code by adding a chapter dealing specifically with forfeitures. This section provides for both criminal and civil forfeitures of money involved in money laundering, money or property traceable to money laundering, and where this money or property cannot be located or has been transferred to a third party. The same Sixth Amendment issues raised in the context of the current forfeiture statute would be exacerbated under this legislation.

Applications of this statute could have a "chilling effect" on protected First Amendment activity. For example, it could be a crime for a candidate to receive money from certain unions if the candidate should have known that the union was involved in illegal activity or if leaders of the union had some connection with organized crime figures. Could a congressional investigation or a report by the President's Organized Crime Commission about certain union officials or corporate executives put politicians at peril if they accepted PAC money from them? Is this statute a potential basis for even more intrusive, even politically motivated versions of Abscam?

While we would expect federal agencies to use "discretion", it would be wiser to enact a narrow statute which addressed money laundering through financial institutions perse; one that indeed established a more direct way to investigate and prosecute such schemes than reliance on the Bank Secrecy Act but avoided the potential pitfalls of the Administration proposal. We believe this is the intent of Senator Dennis DeConcini's bill, S.1385 and

that is why we do not oppose his bill. We hold the same view regarding Senator D'Amato's original proposal, S. 572.

III. Other Crimes

At the outset of our testimony, we described the Administration proposal as a prosecutor's "wish list" rather than a balanced approach to the problem of money laundering. The first proof of this is the scope of the money laundering crime. The second is the unnecessary amendment of the Right to Financial Privacy Act. The third is that section 8 of the bill also establishes a crime of "facilitation" and a new offense of "receiving the proceeds of a crime."

These are crimes of general application and may have sweeping and dangerous applications. We believe the crime of facilitation goes far beyond established concepts of criminal mens rea and is both overbroad and vague. Does a bus company facilitate a crime by bringing demonstrators to Washington who are planning to engage in civil disobedience? Does a hotel facilitate a crime by making space available to alleged mafia figures who use the facility to plan a crime?

The crime of receiving the proceeds of a crime would punish anyone who received such proceeds knowing or believing the same has been obtained in violation of law. Are employees of E.F. Hutton or a defense contractor found to have violated the law guilty of a crime for taking home their paychecks because they believed the money was derived from illegal activity?

Conclusion

In conclusion, Mr. Chairman, we have today focused our testimony on the Administration bill, S.1335 and principally on how it would adversely effect bank record privacy. However, we believe the legislation deserves close and broad scrutiny on a range of issues posed by various other sections of the bill. We have touched on some of those today and would like to reserve the right to supplement the record with additional comments. We urge

the Committee to hold further hearings and to solicit the views of experts in criminal and constitutional law.

As we said at the outset, we believe money laundering is a problem but that a balanced approach which meets law enforcement needs without violating civil liberties is necessary. S.1335 is not balanced and constitutes a serious threat to civil liberties. We urge its rejection and that the Congress proceed with more narrowly drawn legislation that indeed strikes a just balance between competing and compelling public interests.

Senator MCCONNELL. Thank you, Mr. Berman.

Senator DeConcini, do you have questions?

Senator DECONCINI. Mr. Chairman, I do have questions but I would ask that you let me submit them due to the time constraints. I know the chairman has got the same place to go as I, only to a different room, at this time, so I will just submit them for the record.

Senator MCCONNELL. The record will be left open for the submission of responses to the questions that we are going to propound to you gentlemen in writing. We appreciate very much your coming.

The hearing is concluded.

[Whereupon, at 12:05 p. m., the committee was adjourned.]

57-310 O—88——8

APPENDIX

STATEMENT OF JOHN K. VAN DE KAMP
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
TO THE COMMITTEE ON THE JUDICIARY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am pleased to have the opportunity to submit this written statement in which I will discuss the serious challenge of money laundering and the proposals to deal with this problem which are currently pending before this Committee.

First, I will discuss this issue from my perspective as the chief law enforcement officer in the State of California and focus upon the unique circumstances which have made money laundering a significant and ever growing concern for both law enforcement and the financial community in California.

Second, I will urge the members of this Committee to pass out legislation which will (1) create a new criminal offense of money laundering, (2) amend the Right to Financial Privacy Act to permit financial institutions to cooperate with law enforcement, and (3) strengthen the reach and effectiveness of the Bank Secrecy Act.

Finally, I will briefly discuss some of the major provisions of the bills pending before the Committee.

The abuse of our financial institutions, which once made the banks of Florida temples to the drug trade, has spread across the nation to the mightiest financial institutions in the country's largest state. The determined and innovative efforts by federal authorities in California

to stem this abuse have sadly been overwhelmed by the sheer enormity and complexity of the problem. Above all else, the existing federal laws, including the Bank Secrecy Act and its implementing regulations, fall far short of adequately addressing the intricate schemes of these criminal financial manipulators.

The Interim Report by the President's Commission on Organized Crime -- "The Cash Connection: Organized Crime, Financial Institutions and Money Laundering" -- has documented the diversity and magnitude of money laundering in this country. That report further illustrated that this practice serves vital interests of organized crime, narcotics traffickers and corrupt business interests while simultaneously undermining the soundness and integrity of the very financial institutions upon which these schemes rely.

This Congress has already heard testimony from top officials in the Department of Justice and the Treasury. These officials have described the scope and cost of this problem, the ever growing challenge which money laundering poses to law enforcement's efforts against organized crime, the drug trade, and political corruption, and the threat this abuse poses to the integrity of our financial institutions. Nowhere are these observations more apropos than as applied to the situation presently existing in the State of California. The reasons for this are historic and geographic, but they also tied to the existing efforts against the drug trade and money laundering which are being carried out a continent away in the Southeast United States.

California has a tradition of virtually anonymous banking. This is attributable to a large, expanding and historically mobile population utilizing our predominantly multi-branch banking and thrift systems. Customers have

long been faceless account numbers and a bank just so many look alike branches within shopping centers along our freeways.

Blessed with economic prosperity and a booming real estate market from the post-war years on, "new money," and large sums of it, is not unusual in California. New business enterprises, many on the cutting edge of technology and service, have and continue to spring up and flourish in our state.

These elements of mobility and growth, while normally wholesome economic factors, render California financial institutions particularly vulnerable to money laundering because they tend to camouflage the money launderer and his otherwise suspicious activities.

In addition to these internal conditions, California, like Florida, is an international trading center and has geographic and cultural ties with Latin America. Our trade with the Asian nations of the Pacific brings a tremendous volume of goods into and through the State of California, and with it the demand for financial services to underwrite this commerce. On the darker side, this legitimate trade shares its means of transportation, ports of entry and financial services with the illicit traffic in Asian produced heroin and other controlled substances.

To the south is Mexico, and through that country the remainder of Latin America. San Ysidro in San Diego is the busiest port of entry in the world. Competing with the legitimate commerce through this port is a constant stream of illegal immigrants, illicit drugs, and currency, both domestic and foreign, seeking a safe and reliable haven. According to the United States Customs Service, approximately 100 million dollars in <u>reported</u> currency passes through the San Ysidro Port each month -- that is 1.2 billion dollars annually.

This amalgam of factors -- California's position as an international trading center, its connection to Mexico and Latin America, and its mobile and expanding population and economy -- leave California financial institutions as natural and exploitable points for transacting the proceeds of illicit activities, most particularly the drug trade.

A good example of this is the recent, record 2.25 million dollar fine levied by the Department of the Treasury against the Crocker Bank, one of California's leading financial institutions and the nation's twelth largest bank. This fine reflected some 3.89 billion dollars in transactions which should have been reported under the Bank Secrecy Act. Of this sum, 3.88 billion dollars represented transactions involving cash shipments from six Hong Kong banks, and 31 million dollars in cash transactions at but two Crocker branches on the Mexican border in San Ysidro and Calexico.

While the source or purpose of these funds has not been positively documented as being tied to criminal activity, this case graphically illustrates the potential for abuse which exists. Further we are informed that the Department of the Treasury is expected to assess a substantial fine for violations of the Bank Secrecy Act on the Bank of America, California's largest bank. Our information is that the Bank of America's violations, while involving less money that Crocker's, are more widespread throughout the bank and reflect scores of unreported domestic transactions.

However, the problem in California is not wholly a product of our distinct social habits and position as a center of trade and human commerce. The members of this Committe are well aware of the virtual war which has been declared on the drug trade in the Southeast United States. A major component of the attack on drug trafficking in

South Florida has been the effort, began in 1980, to suppress money laundering through financial institutions using information required by the Bank Secrecy Act. This effort, known as Operation Greenback, together with the general interdiction efforts has met with widespread success in South Florida. Additionally, the states of Florida and Georgia have enacted laws which would require the banks of those states to file duplicate Bank Secrecy Act reports with state officials; thereby expanding the scrutiny under which those institutions and their customers operate. The effect of this intense concentration of resources and law enforcement attention in the Southeast United States has been to force adjustments by international and domestic drug traffickers in the routes of importation and channels of distribution. It has also meant that these traffickers are in the market for new, less scrutinized financial institutions, located near the points of importation and distribution.

California is one of the leading illegal drug consumer marketplaces in the country. It is also a natural point of entry for this illicit commodity from the south over the porous border we share with Mexico and from the east through our ports and harbors. Our experience in recent years suggests that many large-scale drug importation and distribution organizations have relocated from the Southeast United States or have come directly from South America and taken up operation in California.

As an example, Conrado Valencia-Zalgado, known to both law enforcement and in the drug underworld as "El Loco," was one of the most notorious and violent Columbian cocaine cowboys in Miami. After his arrest in Miami in 1979, Valencia posted $105,000 cash bail and disappeared. "El Loco" took a new name, moved his entire family to Los Angeles where he allied with a Mexican drug importer, and reestablished his multi-kilo cocaine distribution

operation. In 1982 Valencia was captured by Los Angeles County Sheriff's narcotics detectives and he and his ring were successfully prosecuted by my Special Prosecutions Unit and the United States Attorney's Office in Los Angeles.

"El Loco" is but one of the scores of South American cocaine importers and distributors who have taken up operation in Southern California over the past five years. A task force of federal, state and local narcotics agents in Los Angeles has been targeted exclusively at these South American operations. To date the infamous Lopera, Ochoa and Nelson Reyes organizations, among others, have fallen, hundreds of kilograms of cocaine and millions of dollars in cash have been seized.

In 1983 in a rural area of beautiful San Luis Obispo County, north of Los Angeles, agents of my department's Bureau of Narcotic Enforcement broke up the Echegoyen ring of Peruvian drug manufacturers who were operating a cocaine purification laboratory which converted cocaine paste into the useable product.

Additionally, in recent years in our major ports, state and federal narcotics agents have reported record seizures of cocaine, marijuana and other controlled substances at the terminus of their direct importation from South America. Along the Mexican border, Customs and federal drug agents have in the past months interdicted drug caches in quantities previously unknown.

On Saturday, October 19, 1985, United States Customs agents at the Port of Entry at San Ysidro seized a pickup truck carrying 74½ pounds of cocaine worth $30 million. This seizure represented 5% of the amount of cocaine the Drug Enforcement Administration seized in California in all of 1984. These law enforcement successes tell us that the drug traffickers and distributors have brought their operations to the immediate area of their most lucrative market -- California.

As might be expected, this encroachment of international drug importation and wholesale distribution directly in California has been accompanied by a sudden and remarkable surge in the number of large cash transactions conducted in California's financial institutions. Between 1980 and 1983, major cash transactions reported in compliance with federal law jumped by 60 percent, from $13 billion to nearly $21 billion dollars. In 1980, California banks reported a 300 million cash deficit. By 1984, these same banks were swollen with one billion dollars in surplus cash. And this upward trend is continuing. Los Angeles area banks withdrew $136 million dollars in cash from the Federal Deposit Bank in 1980. Last year, these same banks had a $374 million dollar surplus of cash. In the San Francisco area the figures are even more dramatic. From a $166 million dollar deficit in 1980, banks in that area of California showed a cash surplus of over one billion dollars in 1984. In the first eight months of 1985 California banks reported a $1.4 billion cash surplus. While we cannot say with certainty how much of this cash surplus is attributable to the proceeds of crime, the concurrent rise in the local drug trade and cash surplus and the experience in South Florida, strongly suggests a close connection.

Behind these statistics are the reality of major narcotics operations, corrupt bank officials, tragically failed financial institutions and lingering questions about the integrity of even California's foremost financial institutions.

In 1981 there was the Garfield bank case prosecuted by the United States Attorney's Office in Los Angeles. At the behest of a Los Angeles attorney, eight employees of that Los Angeles bank laundered millions of dollars worth of drug proceeds before the scheme was uncovered by federal

agents. The ensuing investigation and prosecution resulted in the execution style murder of the attorney and the indictment and conviction of the bank, its president and chairman of the board, a vice-president, and a former vice-president.

One year later in the "Grandma Mafia" case, which was again prosecuted by the United States Attorney's Office in Los Angeles, a group of middle-aged women led by a sixty-year-old grandmother laundered 25 million dollars in drug proceeds in a short six-month period. Operating in the mode of the so-called "smurf" scheme, these women went from bank branch to bank branch depositing just under $10,000, the threshold for the filing of a currency transaction report under the Bank Secrecy Act. Later, during interviews with federal agents, one of the women cheerfully and candidly admited why they had conducted their business in California rather than in Florida where the cash had originated: "The heat is on" in Florida; depositing the cash in California was much less risky.

The indictments continue to come. In June of this year the United States Attorney in San Diego indicted the former manager of the Bank of Coronado's San Ysidro Branch, Guadalupe Alcantar, and four others on forty-four counts of conspiracy to defraud the bank, and violations of the Bank Secrecy Act. Over an eighteen month period, Alcantar transacted 20 million dollars -- 10 percent of the bank's total business -- through accounts held by known or suspected narcotics traffickers. Federal affidavits revealed that Alcantar did not blanche when customers brought tens of thousands of dollars stuffed in satchels, plastic bags and boxes into the bank. "If they sell hard dope, they sell hard dope," she reportedly told a fellow employee.

On July 17, 1985, the United States Attorney's Office in Los Angeles announced the indictment of ten individuals in a 4 million dollar laundering scheme which directly involved the profits of cocaine traffickers transacted in less than $10,000 increments through the bank accounts of two seemingly legitimate businesses.

As encouraging as these successful investigations and prosecutions are, we can be sure that they represent but the tip of the iceberg of the illicit money market in California. From the ragtag currency exchange houses along San Ysidro Boulevard, many of which are nothing more than small house trailers, to the majestic steel and glass headquarter offices in the financial district of San Francisco, there is a kind of leukemia of illicit money in the financial bloodstream of California. Further, the available treatment both in terms of efficacy and availability is no match for the disease.

My office has made a careful study of the Bank Secrecy Act, the major weapon in the battle against money laundering. While provisions of the Comprehensive Crime Control Act of 1984 substantially strengthened the laws pertaining to currency reporting, the Bank Secrecy Act and its implementing regulations do not adequately respond to the intricate machinations of criminal money launderers.

Under existing law and regulations, money laundering must be prosecuted as a violation of the reporting requirements of the Bank Secrecy Act or as a conspiracy to defraud the government by obstructing the filing of accurate reports. The theory of criminal culpability under these statutes as applied to money laundering is at best tenuous and prosecution is extremely difficult. In order to obtain a conviction it is neccesary to prove awareness of the reporting requirements and an effort to avoid the filing of the report. Likewise, in order to prove a conspiracy it is necessary to demonstrate that the defendants knowingly acted

in concert to avoid the reporting requirements or to obstruct law enforcement. These theories of culpability necessarily raise the difficult issue of the distinction between noncriminal avoidance and criminal evasion of the law.

The shortcomings in the law and its regulations were exposed in the July 1, 1985, decision by the United States Court of Appeals for the First Circuit in the case of United States v. Anzalone (84-1628). In that case the government charged the defendant with violations Title 18 pertaining to the concealment of material facts from the government, aiding and abetting, as well as violations of the Bank Secrecy Act. The defendant had purchased twelve cashier's checks of an aggregate value in excess of $100,000 but in twelve separate transactions of less than $10,000. The cashier's checks were applied in a public corruption scheme. In the words of the Court of Appeal, "The government decided to test the limits of the statutory interpretation by charging appellant." The government alleged the twelve transactions were part of the same "event" and that by "structuring" the transaction the defendant had prevented the bank from filing reports under the Bank Secrecy Act. The appeals court found that the government had gone beyond the limits of the law including the Bank Secrecy Act and its regulations which the court held to be ambiguous as applied to those circumstances. The court further found that under the law as it presently exists, there was no illegal evasion of the reporting requirements of the Bank Secrecy Act. In reversing the defendant's conviction, the Court of Appeal invited Congress to eliminate the loopholes in the law and warned that it was unwilling to "stretch statutory construction past the breaking point to accommodate the government's interpretation."

The same challenges to the application of the Bank Secrecy Act have been leveled in an appeal from the successful prosecution of a major "smurf" money laundering ring in Los Angeles. In that appeal, United States v. Ronderos, (84-5298) the Ninth Circuit will decide if the Bank Secrecy Act can properly be brought to bear against even this relatively primitive mode of money laundering.

Owing to the substantial difficulty of prosecuting under the existing law at best, and a real possibility that the law may not apply at worst, the critical need for a straightforward money laundering statute is readily apparent. For this reason the National Association of Attorneys General at its summer meeting adopted unanimously a resolution urging this Congress to enact legislation providing for a federal offense which would prohibit the laundering of money by prohibited monetary transactions. (A copy of the National Association of Attorneys General Resolution Regarding Money Laundering is attached to this statement.)

Indeed, I view the need for a money laundering statute as being so compelling that I have joined with Assemblymen and Senators in the California Legislature and District Attorneys in the State of California in sponsoring state legislation which will create a money laundering offense. (This proposal is embodied in SB 1470 introduced by Senator Dan McCorquodale (D-San Jose) and AB 2182 introduced by Assemblyman Steve Clute (D-Riverside), these are identical measures and a copy of SB 1470 is attached to this statement.)

In addition to creating a money laundering offense, our legislation also calls for the creation of a broad monetary instrument transaction reporting requirement for financial institutions operating in the State of California. While this aspect of the legislation is based upon the

reporting requirements of the Bank Secrecy Act, we are urging the adoption of certain features which will close what we view to be substantial loopholes in the existing federal reporting requirements which are prescribed in the regulations.

Both my office and the National Association of Attorneys General perceive "structured" transactions under the existing $10,000 reporting requirement threshold to be a major threat to the effective application of the Bank Secrecy Act to money laundering schemes. Therefore, our monetary instrument transaction reporting proposals carry with it a "cumulative" transaction reporting requirement. This provision will require reports to be filed when any series of transactions attributable to one customer or one account exceeds $10,000 in one day or $25,000 over a five day period. This "cumulative" transaction reporting requirement is based upon experience which demonstrates that criminal enterprises have circumvented the Bank Secrecy Act by conducting multiple transactions just under the reporting threshold (so-called "smurfing" cases) and by corrupt or questionable bank practices which encourage or permit customers to "split" transactions in order to avoid reporting requirements. Although none of the bills presently pending before this Committee calls for such a "cumulative" transaction reporting requirement, the National Association of Attorneys General and I join in requesting your serious consideration toward enacting such an amendment to the Bank Secrecy Act or seeking a change in the regulations promulgated by the Treasury Department.

Another deficiency in the existing Bank Secrecy Act is the loose regulation of exemptions from reporting which may be granted by financial institutions. In the legislation which we are sponsoring in California, we propose to give the Attorney General the right to review and

disallow any exemption, which must in the first instance be approved by two officers of the financial institution.

I now would like to discuss briefly a few of the major provisions of the three bills (S. 572, S. 1335 and S. 1385) which are pending before this Committee.

Initially, we have studied the Interim Report of the President's Commission on Organized Crime regarding money laundering and believe that the Commission's legislative recommendations are well founded and ought to be reflected in any bill which proceeds from this Committee.

Clearly there is the need to enact a federal offense of money laundering and each of the bills pending before this committee proposes to accomplish this. As among the different money laundering offense proposals contained in the various measures, it is my view that the money laundering offense detailed in S. 572 and S. 1385 is the preferred formulation of this new crime. The offense detailed in these bills is appropriately directed at transactions conducted by or through a financial institution. Second, the knowledge or scienter requirement is a straightforward actual knowledge or "reason to know" test.

In my opinion the formulation of the offense in S. 1335, which embodies the administration's proposal, attempts to define the offense too broadly in that it covers any transaction which "in any way or degree affects interstate or foreign commerce". I believe this definition of the offense is broader, and as a result not as directed and specific, as a money laundering offense should and ought to be. If this formulation is designed to reach transactions not conducted through what is traditionally understood to be a financial institution, then I would suggest that the definition of "financial institution" be expanded. This is the approach we have adopted in our legislation in California.

The "reckless disregard" scienter requirement contained in S. 1335 -- which is further defined as an awareness and disregard of a substantial risk that the transaction involves the proceeds of a criminal offense -- is an unclear standard which may pose compliance difficulties and may unnecessarily complicate prosecutions of the offense. I do not concur with the administration's argument that the "reason to know" test establishes a negligence standard which is not suitable for subjecting a person to criminal sanctions. In my view the "reason to know" test is as rigorous as the "reckless disregard" standard and will be proved by the same factual considerations. The "reason to know" test is preferable because it is more amenable to proof and should be easier for a jury to comprehend than the "reckless disregard" standard.

I do support that aspect of S. 1335 which ties money laundering to any federal or state felony.

I strongly support the criminal forfeiture provisions which are contained in S. 1335 (proposed 18 U.S.C. section 2601). In particular the "substitute assets" or tracing features of this criminal forfeiture proposal should prove to be a powerful weapon in the arsenal of the prosecution in that it strikes at the very heart of organized crime and drug trafficking -- the criminal profits.

In keeping with the recommendations of the President's Commission on Organized Crime, I support the proposals made in S. 1335 to amend the Right to Financial Privacy Act in order to permit financial institutions to report possible violations of the law to law enforcement without running afoul of the Act. In this same vein I support those aspects of S. 1335 which will extend civil immunity or a "good faith" defense to financial institutions for reporting suspicious activity to law enforcement.

In relation to these provisions, S. 1335 proposes to amend the Right to Financial Privacy Act to preempt any state or local law or regulation which is more restrictive of disclosure to a government authority concerning a possible violation of law than the Right to Financial Privacy Act would be as amended. Obviously as a state Attorney General, I am very sensitive to any effort to preempt state law, particularly in an area such as this where my Legislature has spoken explicitly on the issue. (See California Government Code sections 7470, et seq., the California Financial Privacy Act). However, as the members of this committee will note, the legislation which we are sponsoring in California proposes to modify our own Financial Privacy Act to permit the filing of reports which would be required under the monetary instrument reporting requirements of the legislation. At the present time we are also studying the possibility of offering amendments to our legislation which will exempt from the Financial Privacy Act reports by financial institutions of possible violations of law. Therefore I will say that I perceive the underlying validity and support the goals which those proposals seek to achieve.

In general, I support all of the measures contained in the bills pending before the committee which will strengthen the effectiveness and reach of the Bank Secrecy Act. I particularly support the proposed revision of section 5319 of Title 31, as contained in S. 1335 which would explicity authorize the Secretary of the Treasury to provide Bank Secrecy Act information to local law enforcement when consistent with the purposes of the Act. This amendment is in keeping with the spirit of recent amendments to Title III of the Omnibus Crime Control Act (18 U.S.C. § 2510 et seq.) and Rule 6(e) of the Federal Rules of Criminal Procedure which authorize wider sharing of

wiretap and grand jury information, respectively, with local law enforcement. Such information sharing recognizes that money laundering is a common concern of both the federal and state law enforcement.

In summation, law enforcement at the state level is gravely concerned with the problem of money laundering. Through their resolution calling for the adoption of a federal money laundering statute and amendments to the Bank Secrecy Act, my fellow State Attorneys General have evidenced this concern. I believe that the problem of money laundering is particularly acute in California and that the situation will further deteriorate without strong and resolute measures by this Congress which will give law enforcement and prosecutors adequate and effective means with which to deal with this problem. In keeping with my comments today, I believe that various proposals contained in the three bills which are pending before this Committee can and should be forged into a single measure which will adequately address all aspects of this complex matter.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Summer Meeting
Colorado Springs, Colorado
July 15 - 18, 1985

RESOLUTION

MONEY LAUNDERING

WHEREAS, "money laundering" is defined by the President's Commission on Organized Crime as " the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate;" and

WHEREAS, organized crime depends in large measure for its successful operation on being able to launder money and make funds generated by criminal activity appear to come from legitimate sources; and

WHEREAS, between $50 and $65 billion in tainted money is laundered through legitimate financial institutions in this country every year; and

WHEREAS, federal law does not presently proscribe money laundering as a distinct offense; and

WHEREAS, the President's Commission on Organized Crime has determined that there are gaps in the reach of the Bank Secrecy Act that permit criminals to launder illegal profits with "virtual impunity" and without triggering the reporting requirements of the Act; and

WHEREAS, prosecution for violation of the Bank Secrecy Act for failure to file required forms is an inadequate means to curb money laundering, as demonstrated by the continued laundering activity engaged in by organized crime;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General urges Congress to enact legislation providing for a federal offense that would prohibit the laundering of money by prohibiting monetary transactions, both through financial institutions and other transfers that affect interstate commerce, where engaged in with the intent to promote, manage, establish or carry on criminal activity; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General urges the Congress to enact legislation that would close the loopholes in the Bank Secrecy Act by requiring the reporting of cumulative transactions over a threshold amount and by giving the Secretary of the Treasury the power to review and disapprove report exemptions; and

BE IT FURTHER RESOLVED, that the Association authorizes its Executive Director and General Counsel to make these views known to the Congress, the Administration, and other interested parties.

AMENDED IN SENATE AUGUST 19, 1985

SENATE BILL No. 1470

Introduced by Senators McCorquodale, Davis, Bill Greene, Maddy, Mello, Montoya, Presley, Roberti, Rosenthal, Stiern, Torres, and Watson

June 24, 1985

An act to amend Section 7471 of the Government Code, to add Chapter 10 (commencing with Section 186.9) to Title 7 of Part 1 of, and to add Title 11 (commencing with Section 14160) to Part 4 of, the Penal Code, relating to financial transactions, *and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1470, as amended, McCorquodale. Financial transactions: proceeds of criminal activity: financial institution reporting.

(1) Existing law makes property and proceeds acquired through a pattern of criminal profiteering activity subject to forfeiture upon conviction of an underlying offense, as specified. Existing law makes it a criminal offense to knowingly buy or receive stolen property or property otherwise acquired by extortion or theft or to knowingly conceal, sell, or withhold the property from the owner or aid therein.

This bill would impose a state-mandated local program by making it a criminal offense to knowingly conduct or attempt to conduct a financial transaction *(1) through a financial institution with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of criminal activity, or (2)* in property derived from criminal activity, as defined. The offense would be punishable as prescribed either as a felony or misdemeanor. Upon conviction, the property *or money*

which was the subject of, *or is traceable to,* the financial transaction would be forfeited, as specified, *or if the property or money is unavailable, as specified, other property of the defendant up to the value of the tainted property or money would be forfeited.*

(2) With specified exceptions, existing law precludes financial institutions from disclosing financial records of customers to state or local agencies.

This bill would require defined financial institutions to maintain records of defined monetary instrument transactions over $10,000 or, with respect to an individual customer *or account*, totaling more than $10,000 in a 24-hour period or $25,000 in a 5-day period. The bill would; ~~with a specified exception,~~ require these transactions to be reported to the Department of Justice as prescribed in regulations of the department, *however, an exemption may be granted, as specified.* Reports received by the department under this bill would not be required to be disclosed as public records, but the department would be *required to analyze the reports and report possible violations to the appropriate criminal justice, tax, or regulatory agency. The department would also be* authorized to supply the reports to specified public agencies and to otherwise make use of the reports for any purpose consistent with the bill. The bill would exempt reporting financial institutions from liability for loss or damage resulting from compliance with the bill or any governmental use of reports.

The bill would impose a state-mandated local program by making it a criminal offense to willfully violate any of the above requirements or regulations of the department ~~adopted pursuant thereto~~. The offense would be punishable as a felony or misdemeanor, as specified.

(3) *The bill would appropriate an unspecified amount to the department for certain costs related to the act.*

(4) The California Constitution requires the state to reimburse local agenciesand school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: ~~majority~~ ⅔. Appropriation: ~~no~~ *yes*. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 7471 of the Government Code is amended to read:

7471. (a) Except in accordance with requirements of Title 11 (commencing with Section 14160) of Part 4 of the Penal Code or Section 7473, 7474, 7475, or 7476 of this code, no financial institution, or any director, officer, employee, or agent of a financial institution, may provide or authorize another to provide to an officer, employee, or agent of a state or local agency or department thereof, any financial records, copies thereof, or the information contained therein, if the director, officer, employee or agent of the financial institution knows or has reasonable cause to believe that such financial records or information are being requested in connection with a civil or criminal investigation of the customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings.

(b) This section is not intended to prohibit disclosure of the financial records of a customer or the information contained therein incidental to a transaction in the normal course of business of such financial institution if the director, officer, employee or agent thereof making or authorizing the disclosure has no reasonable cause to believe that the financial records or the information contained in the financial records so disclosed will be used by a state or local agency or department thereof in connection with an investigation of the customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings.

(c) This section shall not preclude a financial institution, in its discretion, from initiating contact with, and thereafter communicating with and disclosing customer financial records to, appropriate state or local agencies concerning suspected violation of any law.

(d) A financial institution which refuses to disclose the financial records of a customer, copies thereof or the information contained therein, in reliance in good faith upon the prohibitions of subdivision (a) shall not be liable to its customer, to a state or local agency, or to any other person for any loss or damage caused in whole or in part by such refusal.

SEC. 2. Chapter 10 (commencing with Section 186.9) is added to Title 7 of Part 1 of the Penal Code, to read:

CHAPTER 10. MONEY LAUNDERING

186.9. As used in this chapter:

(a) "Conducts" includes, but is not limited to, initiating, concluding, or participating in conducting, initiating, or concluding a transaction.

(b) *"Financial institution" means, when located or doing business in this state, any national bank or banking association, state bank or banking association, commercial bank or trust company organized under the laws of the United States or any state, any private bank, industrial savings bank, savings bank or thrift institution, savings and loan association, or building and loan association organized under the laws of the United States or any state, any insured institution as defined in Section 401 of the National Housing Act, any credit union organized under the laws of the United States or any state, any foregin bank, any currency exchange, any person or business engaged primarily in the cashing of checks, any person or business who regularly engages in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except where acting as a selling agent as an incidental part of another business not specified in this subdivision, any broker or dealer in securities registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 or with the Commissioner of Corporations under Part 3 (commencing with Section 25200) of Division 1 of Title 4 of the Corporations Code, any licensed transmitter of*

funds or other person or business regularly engaged in transmitter of funds or other person or business regularly engaged in transmitting funds to a foreign nation for others, any investment banker or investment company, any insurer, any dealer in gold, silver, or platinum bullion coins, diamonds, emeralds, rubies, or sapphires, any pawnbroker, and telegraph company, and personal property broker, any real property securities dealer, and any mortgage loan broker.

(c) "Financial transaction" means the deposit, withdrawal, transfer, bailment, loan, pledge, payment, or exchange of currency, real or personal property or any interest therein, or a monetary instrument, as defined by subdivision (c) of Section 14161, by, through, or to a financial institution, as defined by subdivision (b) of Section 14161.

~~(c)~~

(d) "Monetary instrument" means United States currency and coin, the currency and coin of any foregin country, a bank check, a cashier's check, a travelers' check, a money order payable to the bearer or in which the payee is not identified, a bearer negotiable instrument, a bearer investment security, a bearer security, a stock on which title is passed on delivery, a futures contract, gold, silver, or platinum bullion or coins, diamonds, emeralds, rubies, or sapphires.

(e) "Property derived from criminal activity" means any property constituting or derived from proceeds obtained, directly or indirectly, from a criminal offense ~~listed in paragraphs (1) to (19), inclusive, of subdivision (a) of Section 186.2.~~ *punishable under the laws of this state by death or imprisonment in the state prison or from a criminal offense committed in another jurisdiction punishable under the laws of that jurisdiction by death or imprisonment for a term exceeding one year.*

186.10. (a) Any person who knowingly conducts or attempts to conduct a financial transaction *through a financial institution (1) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any*

criminal activity, or (2) in property derived from criminal activity, with knowledge or reason to know that the property is derived from criminal activity, shall be punished by imprisonment in the state prison, by imprisonment in the county jail for not more than one year, by a fine of not more than two hundred fifty thousand dollars ($250,000) or twice the value of the property transacted, whichever is greater, or by both that imprisonment and fine. However, for a second conviction for a violation of this section, the maximum fine that may be imposed is five hundred thousand dollars ($500,000) or five times the value of the property transacted, whichever is greater.

(b) Notwithstanding any other provision of law, for purposes of this section each individual financial transaction conducted or attempted shall constitute a separate, punishable offense.

(c) Upon a conviction for a violation of this section, the court shall order all the property derived from criminal activity involved in the violation ~~forfeited and distributed in the manner specified in Section 186.8.~~ *or any money or other property, real or personal, which represents the proceeds of or which is traceable to such property, forfeited to the general fund of the state or local governmental entity, whichever prosecutes. In any case in which the property subject to forfeiture, as a result of any act or omission of the defendant, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty; the defendant shall forfeit any other property up to the value of the property otherwise subject to forfeiture pursuant to this section.*

SEC. 3. Title 11 (commencing with Section 14160) is added to Part 4 of the Penal Code, to read:

TITLE 11. RECORDS AND REPORTS OF MONETARY INSTRUMENT TRANSACTIONS

14160. It is the purpose of this title to require ~~financial institutions to record and report large transactions involving monetary instruments because of the high degree of usefulness of this information in criminal, tax,~~ *certain reports or records of transactions involving monetary instruments as defined herein where those reports or records have a high degree of usefulness in criminal, tax,* or regulatory investigations or proceedings.

14161. As used in this title:

~~(a) "Department" means the Department of Justice.~~

~~(b)~~

(a) "Financial institution" means, when located or doing business in this state, any national bank or banking association, state bank or banking association, commercial bank or trust company organized under the laws of the United States or any state, any private bank, industrial savings bank, savings bank or thrift institution, savings and loan association, or building and loan association organized under the laws of the United States or any state, any insured institution as defined in Section 401 of the National Housing Act, any credit union organized under the laws of the United States or any state, any foreign bank, any currency exchange, any person or business engaged primarily in the cashing of checks, any person or business who regularly engages in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except where acting as a selling agent as an incidental part of another business not specified in this subdivision, any broker or dealer in securities registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 or with the Commissioner of Corporations under Part 3 (commencing with Section 25200) of Division 1 of Title 4 of the Corporations Code, any licensed transmitter of funds or other person or business regularly engaged in transmitting funds to a foreign nation for others, any

investment banker or investment company, any insurer, any dealer in ~~precious metals, stones, or jewels~~ *gold, silver, or platinum bullion or coins, diamonds, emeralds, rubies, or sapphires*, any pawnbroker, any ~~telecommunications~~ *telegraph* company, any personal property broker, any real property securities dealer, and any mortgage loan broker. .

(b) "Financial transaction" means the deposit, withdrawal, transfer, bailment, loan, or exchange of currency, real or personal property or any interest therein, or a monetary instrument, by, through, or to a financial institution.

(c) "Monetary instrument" means United States currency and coin, the currency and coin of any foreign country, a bank check, cashier's check, a travelers' check, a money order *payable to the bearer or in which the payee is not identified*, a bearer negotiable instrument, a bearer investment security, a bearer security, a stock for which title is passed on delivery, a futures contract, ~~precious metals, stones, or jewels.~~

~~(d) "Transaction" means any deposit, withdrawal, credit, payment, pledge, sale, transfer, bailment, or loan.~~ *gold, silver, or platinum bullion or coins, diamonds, emeralds, rubies, or sapphires.*

(d) "Department" means the Department of Justice.

(e) "Criminal justice agency" means any state, county, or local agency which has the authority to investigate or prosecute felony offenses described in the laws of the state.

14162. Every financial institution shall keep a record of every monetary instrument transaction or series of transactions involving the same customer *or same account* within a 24-hour period, in excess of ten thousand dollars ($10,000), and every series of transactions involving the same customer within a five-day period in excess of twenty-five thousand dollars ($25,000). Every financial institution shall report these transactions to the department in a form and at the time as the department shall, by regulation, require.

~~14163. The reporting requirements of Section 14162~~

~~do not apply to monetary instrument transactions exempted from the reporting requirements of Section 5313 of Title 31 of the United States Code where approved in writing and upon the signature of two or more officers of the financial institution and subject to review and disapproval by the department. However, the department may, by regulation, require and provide for inspection of records of these transactions.~~

14163. Except as otherwise provided, a financial institution may exempt from the reporting requirements of Section 14162 monetary instrument transactions exempted from the reporting requirements of Section 5313 of Title 31 of the Untied States Code. However, the exemption shall be approved in writing and with the signature of two or more officers of the financial institution and subject to review and disapproval by the department. The department may require, by regulation, the maintenance, and may provide for the inspection, of records of exemptions granted under this section.

14164. A financial institution, or any officer, employee, or agent thereof, that keeps and files a record as required in Section 14162, shall not be liable to its customer, to a state or local agency, or to any person for any loss or damage caused in whole or in part by the making, filing, or governmental use of the report, or any information contained therein.

14165. The department *shall analyze the reports required by Section 14162 and shall report any possible violations indicated by this analysis to the appropriate criminal justice, tax, or regulatory agency. The department* may make information in a report filed under Section ~~14132~~ *14162* available to any criminal justice agency within the state, and to a tax or regulatory agency of the state on request of the head of the agency. The report shall be available for any purpose consistent with this title.

14166. (a) Any person who willfully violates any provision of this title or any regulation ~~adopted pursuant to this title shall be punished~~ *described under this title is punishable* by imprisonment in the state prison, or by

imprisonment in the county jail for not more than one year, or by a fine of not more than two hundred fifty thousand dollars ($250,000) or twice the value of the monetary instruments involved in the transaction or transactions, whichever is greater, or by both that imprisonment and fine.

(b) Notwithstanding any other provision of law, for purposes of this section the failure to make, keep, ~~and~~ *or* file a record *or report* as to each individual monetary instrument transaction, *series of transactions, or exemption,* as required by this title constitutes a separate, punishable offense.

14167. Any report, record, or information obtained by the department or any agency pursuant to this title is not a public record as defined in subdivision Section 6252 of the Government Code and is not subject to disclosure under Section 6253 of the Government Code.

SEC. 4. *The sum of _____ dollars ($_____) is hereby appropriated from the General Fund to the Department of Justice for the costs of receiving, storing, and analyzing the reports required by this act and for enforcing compliance with the reporting and recordkeeping requirements of this act.*

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

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